

FILED
COURT OF APPEALS
DIVISION II

10 MAR -5 PM 3:56

STATE OF WASHINGTON

BY _____
DEPUTY

NO. 39400-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KAREN MOORE AND THE ESTATE OF JOHNNY C. MOORE,
Appellants,

v.

HARLEY-DAVIDSON MOTOR COMPANY GROUP, INC.
AND
DESTINATION MOTORCYCLES TACOMA, LLC,

Respondents.

APPENDIX TO RESPONDENTS' BRIEF

MARK A. KIRCHER
LARS E. GULBRANDSEN

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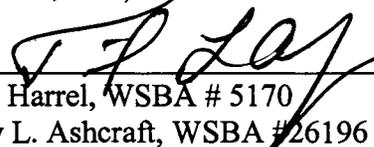
P. Arley Harrel, WSBA #5170
Timothy L. Ashcraft, WSBA #26196
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondent

 ORIGINAL

1301 A Street, Suite 900
Tacoma, WA 98402
(253) 593-5620

DATED: 3/5/10

WILLIAMS, KASTNER & GIBBS PLLC

By  _____

P. Arley Harrel, WSBA # 5170

Timothy L. Ashcraft, WSBA #26196

Attorneys for Respondents

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 5th day of March, 2010, I caused a true and correct copy of the foregoing document, "APPENDIX TO RESPONDENTS' BRIEF," to be delivered by electronic mail and Legal Messenger to the following counsel of record:

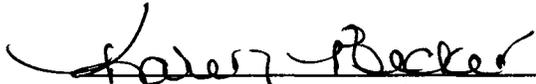
Counsel for Appellant(s):

Mailing Address:

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201 St. Helens Avenue
Tacoma, WA 98402-2519

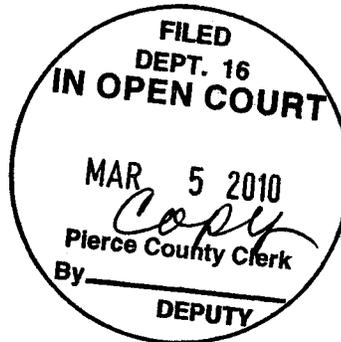
DATED this 5th day of March, 2010, at Tacoma,

Washington.



Karen Becker, Legal Assistant to
TIMOTHY L. ASHCRAFT

FILED
COURT OF APPEALS
DIVISION II
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

KAREN MOORE and the ESTATE OF
JOHNNY C. MOORE,

Plaintiffs,

v.

HARLEY-DAVIDSON MOTOR COMPANY
GROUP, INC., d/b/a HARLEY-DAVIDSON
MOTOR COMPANY, a Washington State
corporation; DESTINATION
MOTORCYCLES TACOMA, LLC, d/b/a
DESTINATION HARLEY-DAVIDSON, a
Washington State Limited Liability Company,

Defendants.

NO. 07-2-07358-8

STIPULATION AND ORDER
REGARDING ENTRY OF THE
TRANSCRIPT OF DR. KAREN
GUNSON

COMES NOW, the parties in the above-entitled action and stipulate that this stipulation as well as the transcript of the Gunson Deposition, attached hereto as Exhibit A, should be entered into the record.

The trial in this matter was held in April and May of 2009. As part of the trial, Dr. Karen Gunson testified via videotaped preservation deposition. However, the transcript of the entered portions was not entered into the record during trial. To correct this oversight, the parties agree that the transcript attached hereto as Exhibit A, with the entered portions highlighted, should be entered into the record. Additionally, to the extent that any person

STIPULATION AND ORDER REGARDING ENTRY OF THE
TRANSCRIPT OF DR. KAREN GUNSON - 1

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

2768188.1

EXHIBIT A

1 reading this stipulation does not have a color copy of the highlighted transcript, the parties
2 stipulate that the entire transcript of Dr. Gunson was heard by the jury with the following
3 exceptions:

- 4 page 9, lines 18 – 25;
- 5 page 15, line 24 – page 16, line 7;
- 6 page 16, line 15 – 20;
- 7 page 18, line 6 – page 19, line 9;
- 8 page 22, lines 14 – 19;
- 9 page 23, lines 7 – 16;
- 10 page 24, lines 5-11;
- 11 page 24, lines 15-16;
- 12 page 24, lines 19 – 22;
- 13 page 25, lines 17 – 18;
- 14 page 27, lines 2 – 7;
- 15 page 35, lines 24 – 25;
- 16 page 36, lines 19 – 20;
- 17 page 37, lines 18 – 20 and line 22;
- 18 page 38, lines 20 and 24;
- 19 page 39, lines 10 – 11.

20 Except for the page and line numbers listed above, the entire transcript of the Gunson
21 Deposition was heard by the jury.

22 The parties so stipulate.

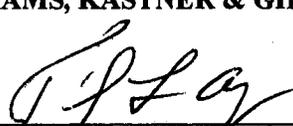
1 Dated: 3/5/2010

Dated: 3/5/10

2 **LAW OFFICES OF DAVID SMITH PLLC**

WILLIAMS, KASTNER & GIBBS PLLC

3
4 By 

By 

5 David C. Smith, WSBA #29824
6 John Mills, WSBA #15824
7 Attorneys for Plaintiffs

P. Arley Harrel, WSBA #05170
8 Timothy L. Ashcraft, WSBA #26196
9 Attorneys for Defendant Harley-Davidson
10 Motor Company Group, Inc. d/b/a Harley-
11 Davidson Motor Company and Destination
12 Motorcycles Tacoma, LLC, d/b/a
13 Destination Harley-Davidson

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STIPULATION AND ORDER REGARDING ENTRY OF THE
TRANSCRIPT OF DR. KAREN GUNSON - 3

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

1 **ORDER**

2 THIS MATTER, having come before the court on the stipulation of the parties, the
3 court being fully advised in the premises, now, therefore,

4 IT IS ORDERED that the Gunson Transcript, attached hereto as Exhibit A, should be
5 entered into the record.

6 IT IS FURTHER ORDERED that the record should reflect that the entire Gunson
7 Transcript, with the exception of the following was heard by the jury:

- 8 page 9, lines 18 – 25;
9 page 15, line 24 – page 16, line 7;
10 page 16, line 15 – 20;
11 page 18, line 6 – page 19, line 9;
12 page 22, lines 14 – 19;
13 page 23, lines 7 – 16;
14 page 24, lines 5-11;
15 page 24, lines 15-16;
16 page 24, lines 19 – 22;
17 page 25, lines 17 – 18;
18 page 27, lines 2 – 7;
19 page 35, lines 24 – 25;
20 page 36, lines 19 – 20;
21 page 37, lines 18 – 20 and line 22;
22 page 38, lines 20 and 24;
23 page 39, lines 10 – 11.

24 This Stipulation, Order and the Transcript of Dr. Gunson are hereby accepted into the
25 record.

STIPULATION AND ORDER REGARDING ENTRY OF THE
TRANSCRIPT OF DR. KAREN GUNSON - 4

2768188.1

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

1 DATED this 5th day of March, 2010.

2
3
4 **LISA WORSWICK**

5 JUDGE LISA WORSWICK

6 Presented by:

7 **WILLIAMS, KASTNER & GIBBS PLLC**

8
9 By *P. Arley Harrel*

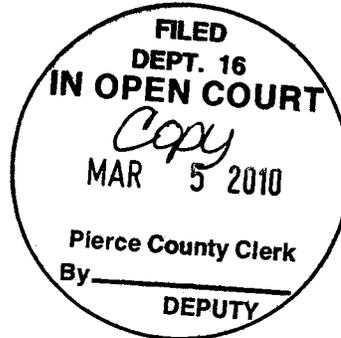
10 P. Arley Harrel, WSBA #05170
11 Timothy L. Ashcraft, WSBA #26196
12 Attorneys for Defendant Harley-Davidson
13 Motor Company Group, Inc. d/b/a Harley-Davidson Motor Company and
14 Destination Motorcycles Tacoma, LLC,
15 d/b/a Destination Harley-Davidson

16 Approved as to Form;
17 Notice of Presentation Waived:

18 **LAW OFFICES OF DAVID SMITH PLLC**

19 By *David C. Smith* *via telephone approval*

20 David C. Smith, WSBA #29824
21 John Mills, WSBA #15824
22 Attorneys for Plaintiffs
23
24
25



STIPULATION AND ORDER REGARDING ENTRY OF THE
TRANSCRIPT OF DR. KAREN GUNSON - 5

Williams, Kastner & Gibbs PLLC
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

KAREN MOORE and the ESTATE)
OF JOHNNY C. MOORE,)
)
Plaintiff,)
)
vs.)
)
HARLEY-DAVIDSON MOTOR)
COMPANY GROUP, INC., d/b/a)
HARLEY-DAVIDSON MOTOR)
COMPANY, a Washington State)
corporation; DESTINATION)
MOTORCYCLES TACOMA, LLC,)
d/b/a DESTINATION)
HARLEY-DAVIDSON, a)
Washington State Limited)
Liability Company,)
)
Defendants.)

No. 07-2-07358-8

DEPOSITION OF KAREN GUNSON, M.D.
Perpetuation of Testimony
April 16, 2009

1 BE IT REMEMBERED that, pursuant to the Washington
2 Rules of Civil Procedure, the deposition of KAREN GUNSON,
3 M.D., was taken for purposes of perpetuating her testimony
4 before SUSAN G. WALKER, a Certified Shorthand Reporter for
5 Oregon, on Thursday, the 16th day of April, 2008, in the
6 offices of the witness, 13309 S.E. 84th, Clackamas, Oregon,
7 commencing at the hour of 10:50 a.m.

8

9 APPEARANCES:

10 David Smith
11 201 St. Helens Avenue
12 Tacoma, Washington 98402
13 253-272-4777
14 Appearing on behalf of Plaintiffs

15 John C. Cain
16 802 North Second Street
17 Tacoma, Washington 98403
18 253-572-8338
19 Appearing on behalf of Plaintiffs

20 P. Arley Harrel
21 Williams Kastner
22 Two Union Square
23 601 Union Street, Suite 4100
24 Seattle, Washington 98101
25 206-628-6600
 Appearing on behalf of Defendants

26 ALSO PRESENT:

27 Mark Dahl, videographer

28

29

30

31

INDEX OF EXHIBITS

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	
	EXHIBIT							PAGE IDENT'D/OFFR'D																	
	206	Medical examiner's report						9 9																	

Gunson - D.

<p>1 KAREN GUNSON, M.D. 2 was thereupon produced as a witness and, having been first 3 duly sworn on oath, was examined and testified as follows: 4 5 DIRECT EXAMINATION 6 BY MR. SMITH: 7 Q Doctor, can you state your name for the record, 8 please. 9 A Yes. My name is Dr. Karen Gunson. And my first 10 name is K-A-R-E-N, and my last name is G-U-N-S-O-N. 11 Q Can you state your address for the record. 12 A It is 13309 S.E. 84th Avenue, Suite 100, 13 Clackamas, Oregon, 97015. 14 Q Doctor, you've been sworn under oath. Are you 15 aware this is a preservation deposition? 16 A I am, sir. 17 Q Do you know what a preservation deposition is? 18 A Perhaps you could explain it to me. 19 Q A preservation deposition is a deposition for 20 trial, and it's as though we are actually at trial. So as 21 we're doing the deposition, I'm going to ask you questions 22 and Mr. Harrel is going to ask you questions. And, by the 23 way, just to state for the record, I'm David Smith, and I 24 represent Karen Moore and the Estate of Johnny Moore in the 25 cause of action of Moore v. Harley-Davidson and Destination</p> <p style="text-align: right;">4</p>	<p>1 I am Board certified in anatomic, clinical and 2 forensic pathology. 3 Q So that's your education. And that's also your 4 medical training. Correct? 5 A Yes. 6 Q And as well as you've just given us your work 7 history. Is that correct? 8 A Correct. 9 Q Have you testified prior to today as an expert? 10 A I have. 11 Q How many times have you testified prior to today 12 as an expert? 13 A I estimate that I probably have testified hundreds 14 of times, mostly in criminal court or criminal Circuit 15 Court here in the state of Oregon. 16 Q Have you testified in civil trials before? 17 A Occasionally; yes. 18 Q Have you testified in civil trials relating to 19 motor vehicle accidents? 20 A I have given depositions, but I've never testified 21 in one. 22 Q Do you know who Johnny Moore is? 23 A I do. 24 Q Can you tell me who Johnny Moore is. 25 A Johnny Moore is a gentleman upon whom I did an</p> <p style="text-align: right;">6</p>
<p>1 Harley. 2 And I'm going to ask you a series of questions at 3 this deposition. And as I ask the questions, if you would 4 wait for a moment to give your answers so that either 5 counsel can object, that would help. If we talk over each 6 other, it can cause problems with understanding what's 7 happening and editing, doing any edit we might do. 8 But, okay, that being said, Doctor, can you tell 9 me what your education is. 10 A Yes. I graduated from Whitman College in Walla 11 Walla, Washington, in 1976 with a Bachelor of Arts degree 12 in biology. I have a Bachelor of Science degree in zoology 13 from Oregon State University which I received in 1977. And 14 in 1977 I went to medical school at Oregon Health Sciences 15 University. At that time it was called the University of 16 Oregon Medical School. 17 And I graduated from that Institution in 1981 with 18 an MD or a doctor's degree. And I was asked to stay on as 19 a resident or trainee in anatomic and clinical pathology. 20 And I completed that course of study in 1985. And at that 21 time I went to work at the medical examiner's office as a 22 Fellow or trainee in forensic pathology. And I have been 23 with the Oregon State Medical Examiner's office since 1985; 24 for 14 years as a Deputy State Medical Examiner and for the 25 last ten years as the State Medical Examiner.</p> <p style="text-align: right;">5</p>	<p>1 autopsy, Wednesday, April 28, 2004. 2 Q Do you have a file on Johnny Moore? 3 A I do. 4 Q Do you have that file with you today? 5 A Yes, I do. 6 Q Why did you perform the autopsy on Johnny Moore? 7 A Johnny Moore died in Clatsop County, which is a 8 coastal county here in Oregon, and his death was reported 9 to me by Dr. Ople, who is the County Medical Examiner. 10 The day after Johnny Moore sustained serious 11 injuries in this motorcycle crash, his family requested 12 that an autopsy be done through a social worker at Emanuel 13 hospital, which is a trauma hospital here in Portland to 14 which his wife had been taken. And she had learned that 15 the family was requesting an autopsy, as they were 16 concerned -- and I'm reading this from the report -- they 17 were concerned the decedent had lost consciousness prior to 18 the accident. 19 Q Did you talk to any family members directly about 20 the concern for loss of consciousness? 21 A No. 22 Q What, if any, background did you get before you 23 performed the autopsy on Johnny Moore? 24 A The background that I got is contained in the 25 medical examiner's report from Dr. Ople that Mr. Moore was</p> <p style="text-align: right;">7</p>

<p>1 traveling with his wife and friends on a motorcycle -- 2 well, with his wife on a motorcycle and with a friend on 3 another motorcycle, and had drifted across or veered across 4 other lanes of traffic and struck a guardrail and had 5 subsequently died, or died because of that impact or 6 related to that impact.</p> <p>7 And when Dr. Opie looked at Mr. Moore, he 8 discovered that he had very severe injuries as a result 9 of that crash. And I pretty much knew that part.</p> <p>10 The other thing that was related to me from 11 Dr. Opie was that, prior to the accident, during a rest 12 stop, Mr. Moore had complained of the heat on that 13 particular day.</p> <p>14 It was also noted by Dr. Opie that he was wearing 15 protective gear. And by that I assume myself that it was 16 probably leather clothing and a helmet.</p> <p>17 Q How far is Astoria, Oregon, from here? 18 A It's about 90 miles, I would say. I'm just 19 estimating; about 90 miles.</p> <p>20 Q So did Dr. Opie, his office, transport Johnny 21 Moore's body to here? 22 A No. Johnny Moore's body at that time was at a 23 mortuary in Astoria called Caldwell's Mortuary. And the 24 mortuary service transported the body from Astoria to the 25 office. And at that time our office was located at 301</p> <p style="text-align: right;">8</p>	<p>1 BY MR. SMITH: 2 Q Looking at your report, can you tell me what your 3 findings were in regard to this autopsy. 4 A Yes, I can. Mr. Moore suffered from a number of 5 injuries. He had what I term as crushing chest injuries. 6 He had large abrasions present across his chest, which are 7 called brush-burn abrasions. That's where a body might 8 scrape across the ground or rug or something along those 9 lines. And there were lacerations or deep skin splits that 10 were present in that mix of brush-burn abrasions. Those 11 lacerations extended deep into the muscle and the fat, or 12 adipose tissue, and I could actually see underlying rib 13 fractures because of those lacerations.</p> <p>14 When we did look inside the body, we could also 15 see that there were rib fractures that extended all along 16 the front of the body on both sides. And the rib fractures 17 involved the ribs, what we call 2 through 10. There are 12 18 ribs. Two through 10 on each side of the sternum or chest 19 plate here, the breast bone.</p> <p>20 When we removed the chest plate to look at the 21 heart, we could see that there was a large laceration or 22 splitting of the tissue through the pericardial sac, which 23 is a bag that surrounds the heart. So I could easily see 24 the heart, because that bag was opened up, and I could see 25 that there was laceration of the heart itself. And that</p> <p style="text-align: right;">10</p>
<p>1 N.E. Knott Street, which is in Portland, not too far from 2 here, but about 20 miles from here. So we had a different 3 location at that time.</p> <p>4 Q Did you perform the autopsy at the Knott Street 5 location? 6 A I did.</p> <p>7 Q I'm going to show you Exhibit -- actually it's not 8 an exhibit. I'm going to show you a document. Would you 9 take a look at that document and tell me what it is. 10 A This is a number of different reports, including 11 the report from Dr. Opie, which we call the medical 12 examiner report. That consists of three pages. There is 13 an autopsy report that I produced, and it is eight pages 14 long. And there is a request for blood alcohol as well 15 as a blood alcohol report form from our testing lab.</p> <p>16 Q Are all these documents in your file? 17 A Yes, they are.</p> <p>18 MR. SMITH: I'd like to mark this as Exhibit 206, 19 if you could, please. 20 (Exhibit 206 marked for identification.) 21 MR. SMITH: (Continuing) And I'll move to admit 22 Exhibit 206. 23 MR. HARREL: Objection as hearsay under rule 403, 24 as more prejudicial than probative; and under 403 as 25 duplicative of the testimony.</p> <p style="text-align: right;">9</p>	<p>1 included both the right ventricle, of the four chambers of 2 the heart, the right atrium, which of course are located on 3 the right side of heart, and into the superior vena cava, 4 which is a large thin-walled vessel that comes from the 5 upper part of the body and head area. And there was a 6 thousand cc. or a couple of pints of blood in the chest 7 cavity, and it actually flowed a little bit into the 8 abdominal cavity.</p> <p>9 There were less severe injuries in the abdominal 10 cavity in the form of lacerations of the liver and spleen.</p> <p>11 Moving on, I could actually feel, before we ever 12 did the autopsy, that he had a neck injury of significance. 13 And when we did actually open up those various areas of the 14 body, I could see that the cervical vertebra number 1 and 15 2, which are located as the highest vertebra in your neck, 16 were fractured. And actually the neck had essentially 17 separated from the head in the bony sections. And that, of 18 course, transected or cut across the spinal cord at that 19 level.</p> <p>20 He also had a fracture of cervical vertebra number 21 7, which is located very low in the neck. And associated 22 with this neck fracture I could see hemorrhage that came up 23 around the base of the brain and up over the sides of the 24 brain in the areas that we call the temporal and parietal 25 lobes. And this was located on both sides of the brain</p> <p style="text-align: right;">11</p>

1 itself.
 2 He did have some injuries to the lower extremities
 3 as well. He had a skinning laceration, where there was
 4 tissue that was stripped from his right thigh. And he had
 5 some abrasions and lacerations present in the lower left
 6 leg. But all of his bones were intact. So these were more
 7 superficial injuries that were located in the lower
 8 extremities.
 9 When we examined the body further, after noting
 10 all these injuries, in examination of the heart, the heart
 11 was of normal size. It weighed 360 grams.
 12 There are four major blood vessels that feed the
 13 heart or blood and oxygen to the heart. One is called
 14 the left anterior descending coronary artery. And that
 15 coronary artery exhibited 80 to 85 percent stenosis or
 16 narrowing due to atherosclerotic plaque. The right
 17 coronary artery, which runs around the top of the heart,
 18 to the right, exhibited 75 percent stenosis, also due to
 19 atherosclerotic plaque. And there was 50 percent stenosis
 20 in the circumflex artery, which is the one that runs around
 21 the top of the heart to the left.
 22 I did not see any evidence of a recent myocardial
 23 infarct, which is also called a heart attack, and I did not
 24 see any evidence of old scar that might have indicated a
 25 previous heart attack.

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1 physical evidence, of a medical condition other than the
 2 stenotic coronary arteries.
 3 Q So what was the cause of death of Johnny Moore?
 4 A I listed the cause of death as neck fracture and
 5 crushing chest injuries on my autopsy report.
 6 Q Was there any evidence of ventricular
 7 fibrillation?
 8 A No. But ventricular fibrillation is a dynamic
 9 event which occurs during life, and there's no gross
 10 findings or no physical findings at the time of autopsy
 11 that I can say that ventricular fibrillation was there or
 12 not there.
 13 Q Can you tell me what ventricular fibrillation is.
 14 A It's something we call an arrhythmia or misbeat of
 15 the heart. And during ventricular fibrillation the heart
 16 is not an effective pump. It sort of quivers. It sort of
 17 shakes rather than actually performing a pumping action.
 18 So that's why we call it fibrillation. It looks like it's
 19 quivering.
 20 Q Based on your knowledge, training and experience,
 21 and to a reasonable medical certainty, did Johnny Moore
 22 suffer from ventricular fibrillation prior to the impact
 23 with the guardrail?
 24 A In my opinion, he did not have ventricular
 25 fibrillation prior to sustaining his injuries.

14

1 Q Do you know if, or did any lab work get done on
 2 Johnny Moore?
 3 A Yes. We did a blood alcohol on Johnny Moore, and
 4 that was negative.
 5 Q Do you have that blood alcohol test report?
 6 A I do.
 7 Q Did you only do the blood alcohol? Did you test
 8 only for alcohol?
 9 A Yes, sir.
 10 Q Was the autopsy completed to your satisfaction?
 11 A Yes.
 12 Q Is there anything that was not done that you think
 13 should have been done in performance of the autopsy?
 14 A Not at this point in time; no.
 15 Q Based on your examination of Johnny Moore, based
 16 on your knowledge, training and experience, and to a
 17 reasonable medical certainty, did you rule out any medical
 18 events at or near the time of death for Johnny Moore?
 19 A Do you mean such as stroke or something like that?
 20 Is that what you're ----
 21 Q Yes.
 22 A I find no evidence of heart attack; that is,
 23 changes in the cardiac muscle. I find no evidence of
 24 stroke in the brain; that is, hemorrhage into the substance
 25 of the brain itself. So I don't find any evidence,

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1 Q Based on your knowledge, training and experience,
 2 and on a more probable than not basis, did Johnny Moore
 3 suffer from ventricular fibrillation prior to the impact
 4 with the guardrail?
 5 A No. I can see evidence that there is hemorrhage
 6 in the form of the subarachnoid hemorrhage or bleeding
 7 around the brain that occurred at the time of the injury.
 8 And because the hemorrhage that we see, both in that area
 9 around the neck and in other areas of the body, that
 10 indicates that the heart is pumping, to some degree, during
 11 that time, and not just fibrillating. Otherwise, it would
 12 not have effective blood circulation through the body, and
 13 we would not see the hemorrhage that we see in the
 14 subarachnoid space and other areas of the body.
 15 Q Do you know what happens when a person suffers
 16 from ventricular fibrillation?
 17 A Well, that is something that can cause sudden
 18 collapse and sudden death if people do not recover from a
 19 fibrillation.
 20 Q When you say sudden collapse, what does that mean?
 21 A To me it means that a person would collapse to the
 22 floor, crumple from a sitting position, become suddenly
 23 limp, and no longer conscious.
 24 Q And assuming that Johnny Moore held on to the
 25 handlebars of the motorcycle all the way to the point of

15

1 ejection from the motorcycle, would that information
 2 further indicate that he did not have ventricular
 3 fibrillation?
 4 MR. HARREL: Object to the form of the question
 5 as leading, and improper statement of the condition.
 6 MR. SMITH: I will rephrase it.
 7 BY MR. SMITH: (continuing)
 8 Q Assuming that Johnny Moore was holding on to the
 9 handlebars all the way up to the impact with the guardrail,
 10 is that consistent with a ventricular fibrillation event?
 11 A I would expect him to crumple sideways or forward
 12 onto the motorcycle and not continue to have purposeful
 13 activity in the form of gripping the handlebars if he had a
 14 ventricular fibrillation.
 15 Q Doctor, do you mean that Johnny Moore's hands
 16 would fall off of the handlebars?
 17 MR. HARREL: Object to the form of the question as
 18 leading.
 19 MR. SMITH: I'll rephrase the question.
 20 BY MR. SMITH: (continuing)
 21 Q If Johnny Moore's hands had fallen off the
 22 handlebars, would that be consistent with ventricular
 23 fibrillation?
 24 A Yes.
 25 Q What, in your experience, tells you -- based on

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1 A I did not find any evidence of stroke in the brain
 2 in the form of hemorrhage or tissue loss. I did not
 3 dissect the carotid arteries through their entire length,
 4 so I am unaware if there might have been stenotic areas or
 5 narrowing of the carotid arteries.
 6 Q So, based on your knowledge and experience, and to
 7 a reasonable medical certainty, Johnny Moore did not have a
 8 cardiac arrest. Correct?
 9 MR. HARREL: Object to the form of the question.
 10 Leading.
 11 MR. SMITH: Let me rephrase it.
 12 BY MR. SMITH: (continuing)
 13 Q Based on your knowledge, training and experience,
 14 and to a reasonable medical certainty, is the -- I'm sorry.
 15 I need to strike that. I just got lost. Excuse me.
 16 Based on your knowledge, training and experience,
 17 and to a reasonable medical certainty, is your examination
 18 of Johnny Moore consistent with a cardiac arrest of Johnny
 19 Moore?
 20 A Well, he eventually did suffer a cardiac arrest
 21 because of his injuries. But as far as -- are you asking
 22 did it occur before the crash? A cardiac arrest?
 23 Q Again, let me rephrase it. I got off a little bit
 24 here.
 25 I'm just going to move on to another question.

18

1 your training, knowledge and experience, and to a
 2 reasonable medical certainty, why is that? Why is Johnny
 3 Moore's hands falling off the handlebars not consistent
 4 with ventricular fibrillation?
 5 A I believe it would be consistent with ventricular
 6 fibrillation. If you have somebody who is in ventricular
 7 fibrillation, there is no blood flow or effective blood
 8 flow to the body, and therefore the subject becomes
 9 unconscious and limp. So if a person is undergoing
 10 ventricular fibrillation -- and we know this from many
 11 studies and also just from practical experience -- they
 12 will suddenly collapse and become unconscious. And that
 13 can occur while walking across the floor or sitting in a
 14 chair or driving, where they suddenly will slump away from
 15 the steering wheel and fall to the right or left.
 16 So ventricular fibrillation causes a lack of
 17 oxygen and blood flow to the brain, and subsequent
 18 unconsciousness and collapse.
 19 Q Is it consistent with losing consciousness to have
 20 hands on the handlebars?
 21 A Usually when people lose consciousness, they
 22 become limp. So I would have to say that it's inconsistent
 23 with unconsciousness to have a grip on a handlebar.
 24 Q Now, did you rule out stroke as a possible reason
 25 for Johnny Moore's death?

17

1 I think you asked me a question, but the question
 2 was whether or not he had a cardiac arrest, if I'm asking
 3 that question. And, yes, I am asking that question.
 4 Did he have a cardiac arrest?
 5 MR. HARREL: Object to the form of the question.
 6 BY MR. SMITH:
 7 Q Go ahead and answer.
 8 A Okay. He did have a cardiac arrest. He did after
 9 he sustained the injuries; yes.
 10 Q Based on your knowledge, training and experience,
 11 and to a reasonable medical certainty, based on your
 12 examination of Johnny Moore, did Johnny Moore have a
 13 cardiac arrest prior to the impact with the guardrail?
 14 A In my opinion, he did not, because of the degree
 15 of hemorrhage that we see associated with the injuries.
 16 Q And, Doctor, can you tell me what tachycardia is.
 17 A Tachycardia is a fast heart rate, something where
 18 the heart is beating very, very fast.
 19 Q Based on your knowledge, training and experience,
 20 and to a reasonable medical certainty, and your examination
 21 of Johnny Moore, in your examination did you conclude that
 22 Johnny Moore had a tachycardia event?
 23 A I can't say one way or the other.
 24 Q Doctor, do you have an opinion as to whether or
 25 not Johnny Moore was alive at the moment of impact with the

19

<p>1 guardrail?</p> <p>2 A I believe he was alive at the moment he hit the</p> <p>3 guardrail; yes.</p> <p>4 Q And based on your knowledge, training and</p> <p>5 experience, and to a reasonable medical certainty, was</p> <p>6 Johnny Moore alive up to the moment of impact with the</p> <p>7 guardrail?</p> <p>8 A Yes.</p> <p>9 Q Doctor, you described earlier that you observed</p> <p>10 blood in the cavity of Johnny Moore's skull, in his brain.</p> <p>11 A I observed blood in the subarachnoid area, which</p> <p>12 is a space on the surface of the brain. Subarachnoid</p> <p>13 hemorrhage occurs when there is blood between the brain</p> <p>14 surface and the covering of the brain called the arachnoid</p> <p>15 layer, which is a thin, translucent layer of membrane. So</p> <p>16 the bleeding occurs right up next to the brain. It doesn't</p> <p>17 flow around the brain. It's right up next to the brain.</p> <p>18 Yes, there is blood in the subarachnoid space over the base</p> <p>19 of the brain, and then up around both the temporal and</p> <p>20 parietal lobes of the brain, which are sort of the sides of</p> <p>21 the brain, in this area.</p> <p>22 Q What is the significance of the blood flow?</p> <p>23 A It indicates to me that, number one, injury has</p> <p>24 been sustained, and that this blood is coming from the</p> <p>25 fracture of cervical vertebra number 1 and 2, which we</p> <p style="text-align: right;">20</p>	<p>1 A It could be; yes.</p> <p>2 Q And why is that?</p> <p>3 A Because even though a person is in tachycardia,</p> <p>4 that is, their heart is beating really fast, there is still</p> <p>5 some pumping action of the heart. And the tachycardia,</p> <p>6 what happens with tachycardia, is that because the heart is</p> <p>7 beating so fast, blood doesn't flow into the left ventricle,</p> <p>8 which is that part which pumps blood around the body. It</p> <p>9 doesn't completely fill the ventricle, because it doesn't</p> <p>10 have time enough before the heart beats again.</p> <p>11 So there's a lesser degree of blood flow from the</p> <p>12 heart to various parts of the body, but there's still some</p> <p>13 pumping action.</p> <p>14 Q When a tachycardia event occurs, does the blood</p> <p>15 flow occur both ways?</p> <p>16 MR. HARREL. Object to the form of the question.</p> <p>17 MR. SMITH: What's the objection?</p> <p>18 MR. HARREL: Ambiguous.</p> <p>19 BY MR. SMITH:</p> <p>20 Q When a person has a tachycardia event, does the</p> <p>21 blood flow in and out of the heart?</p> <p>22 A Well, blood will flow into the heart from -- say,</p> <p>23 for instance, if we're talking about the left ventricle,</p> <p>24 blood will flow into the heart from the lungs. The</p> <p>25 oxygenated blood. And then the heart will pump the blood</p> <p style="text-align: right;">22</p>
<p>1 discussed earlier.</p> <p>2 Whenever you fracture a bone, you get bleeding</p> <p>3 from that. And that particular area is highly vascularized.</p> <p>4 There's lots of blood vessels. So the trauma caused the</p> <p>5 fracture of the bone and tearing of those blood vessels,</p> <p>6 which then resulted in blood flowing into the subarachnoid</p> <p>7 space and around the brain.</p> <p>8 The reason that the blood did that was because</p> <p>9 there was heartbeat at the time that the injury was</p> <p>10 sustained. There had to be heartbeat. Otherwise, we would</p> <p>11 see no reactive hemorrhage that we see not only in the</p> <p>12 subarachnoid space, but also hemorrhage in the soft tissues</p> <p>13 along the right side of the neck and in the abdomen and in</p> <p>14 the superficial injuries that are present on the surface of</p> <p>15 the body.</p> <p>16 Q Is the amount of blood that you saw in Johnny</p> <p>17 Moore consistent with ventricular fibrillation?</p> <p>18 A No.</p> <p>19 Q And based on your knowledge, training and</p> <p>20 experience, to a reasonable medical certainty, again,</p> <p>21 is the amount of blood that you saw consistent with</p> <p>22 ventricular fibrillation?</p> <p>23 A No.</p> <p>24 Q Is the amount of blood that you saw consistent</p> <p>25 with tachycardia?</p> <p style="text-align: right;">21</p>	<p>1 out. So, yes, there is inflow and outflow of blood with</p> <p>2 tachycardia. It is just not as effective as if we had a</p> <p>3 normal heart rate.</p> <p>4 Q If somebody did have a tachycardia event, is there</p> <p>5 a way to identify that event postmortem?</p> <p>6 A No.</p> <p>7 Q So based on your knowledge, training and</p> <p>8 experience, and to a reasonable medical certainty, you</p> <p>9 cannot say that Johnny Moore had a tachycardia event?</p> <p>10 MR. HARREL. Object to the form of the question.</p> <p>11 MR. SMITH: Objection?</p> <p>12 MR. HARREL: Stating in the negative. Ask her</p> <p>13 opinion. And also repetitive, because you already asked</p> <p>14 her.</p> <p>15 MR. SMITH. I'll strike that question.</p> <p>16 BY MR. SMITH: (continuing)</p> <p>17 Q Based on your knowledge, training and experience,</p> <p>18 to a reasonable medical certainty, is the amount of blood</p> <p>19 flow that you saw with Johnny Moore in your examination of</p> <p>20 Johnny Moore, is that consistent with a healthy heart?</p> <p>21 A It's consistent with blood flow. I can't state</p> <p>22 whether it's consistent with a healthy heart because people</p> <p>23 who have coronary artery disease still have a functioning</p> <p>24 heart with a pumping action. So the heart may not be</p> <p>25 healthy, but the pump is still working. There's still</p> <p style="text-align: right;">23</p>

*This is in
This is out*

1 blood flow.

2 Q And assuming that Johnny Moore, prior to being
3 thrown from the motorcycle, lifted his left leg, would
4 that be consistent with unconsciousness in Johnny Moore?

5 MR. HARREL: Object to the form of the question.
6 Lack of foundation.

7 BY MR. SMITH:
8 Q You can go ahead and answer.

9 A It would be consistent with consciousness. If
10 it's purposeful action, it's consistent with consciousness
11 and blood flow to the brain.

12 Q And assuming that Johnny Moore downshifted the
13 motorcycle as he was moving to the left, would that be
14 consistent with unconsciousness?

15 MR. HARREL: Object to the form of the question.
16 Lack of foundation.

17 THE WITNESS: It would be consistent with being
18 conscious, not unconscious.

19 BY MR. SMITH:
20 Q Doctor, let's assume Johnny Moore was either
21 unconscious or dead as the motorcycle was moving to the
22 left. Assuming that -- oh, wait. Strike that.

23 Doctor, do you have any information or do you have
24 any knowledge as to how the passenger behaved on Johnny
25 Moore's motorcycle as it was moving to the left?

24

1 vascular disease, coronary disease or history of arrhythmia.
2 In discussions with a social worker at Emanuel Hospital,
3 it was learned that the family was requesting an autopsy,
4 as there were concerns that the decedent had lost conscious-
5 ness prior to the accident. This was discussed further with
6 a State pathologist, who agreed that an autopsy would be
7 done.

8 Q And, first off, did any of the past history of
9 Johnny Moore, is any of the past history of Johnny Moore
10 important in your evaluation of how he died?

11 A We always want to get as much information as
12 possible. And so it was important, mainly because there
13 was no evidence of natural disease other than hypertension,
14 and backed up the family's puzzlement over the unconscio-
15 ness or perception of unconsciousness.

16 Q Based on your knowledge, training and experience,
17 and to a reasonable medical certainty, can you tell me,
18 after evaluation of Johnny Moore, or your autopsy of Johnny
19 Moore, can you tell me, did Johnny Moore lose consciousness
20 prior to the accident?

21 A I don't know.

22 Q And did you report those findings to the family?

23 A I haven't spoken directly to the family, but I
24 believe the family has requested an autopsy report.

25 MR. SMITH: Thank you. That's all I have right

26

1 A I was told that the passenger was trying to
2 get Mr. Moore's attention by shoving or tapping on the
3 shoulder.

4 Q And if in fact the passenger was shoving or
5 tapping Johnny Moore in the shoulder, would that be
6 consistent with a ventricular fibrillation or
7 unconsciousness?

8 A Well, if the person is unconscious, then I would
9 expect that shoving on a shoulder would cause him to topple
10 from the motorcycle, or at least fall forward onto the
11 motorcycle handlebars.

12 Q Doctor, I'm going to refer back to your report.
13 In your report, on page 3, Exhibit 206, at the bottom there
14 is a note. It's an addendum. Do you see that there?

15 A Oh, I'm sorry. Yes. Just a moment.

16 Yes.

17 Q And in the addendum it indicates, it says that the
18 subject only had a past history of -- well, strike that.

19 Can you read that addendum and tell me where that
20 addendum came from.

21 A Yes. The addendum came from Dr. Opie, the Clatsop
22 County Medical Examiner. The addendum is dated 4/27/04.
23 And it reads as follows: Information gathered from the VA
24 Medical Center in Seattle indicated that the subject had
25 only a past history of hypertension, no history of cerebral

25

1 now.

2 MR. HARREL. Dr. Gunson, do you want a break
3 before I start?

4 THE WITNESS: It's up to you.

5

6 CROSS EXAMINATION

7 BY MR. HARREL:
8 Q Dr. Gunson, my name is Arley Harrel, and I
9 represent Harley-Davidson Motor Company and Destination
10 Harley in this case. And I'd like to ask you a few
11 questions.

12 With respect to your practice, since you graduated
13 from medical school, you have not treated patients. Is
14 that correct?

15 A That's correct.

16 Q Your career has been spent in doing what?

17 A Autopsies. I have a practice that includes mostly
18 autopsies; yes.

19 Q And why in the State of Oregon are autopsies
20 performed by your office by people like yourself?

21 A Well, it's our job to arrive at a cause and manner
22 of death of people who fall under our jurisdiction. Most
23 of the time the people who fall under our jurisdiction are
24 people who have died a violent or unusual death or have
25 been in State custody, or have died suddenly and

27

1 unexpectedly at home. So we're looking for the reason
 2 why that person might have died.

3 Q With respect to Johnny Moore and his heart
 4 condition, I'd like to go over that with you. Okay?

5 A Sure.

6 Q First, kind of for a lay view of the heart, is
 7 there blood flow in the heart, and then there's an
 8 electrical portion that helps the heart pump?

9 A The heart is composed of four different chambers,
 10 and blood flows into the heart from the body into the right
 11 side of the heart and is then pumped into the lungs, where
 12 it is oxygenated by your breathing. And then it flows from
 13 the lungs back to the left side of the heart, where it is
 14 pumped around the body to provide nutrients and oxygen to
 15 all of your body parts.

16 There are two separate conduction systems, if you
 17 will, or reasons why the heart continues to beat. Part of
 18 it is from the brain, so action of the brain. And that is
 19 located at the base of the brain in a place called the
 20 medulla.

21 The heart has its own intrinsic rhythm as well.
 22 There is something called a conduction system in the heart
 23 which maintains a normal heart beat. Specialized tissue is
 24 actually present in the heart muscle or the myocardium.
 25 And that tissue reaches throughout the heart so that the

28

1 of the blood flow. And obstruction of the blood flow
 2 decreases the amount of oxygen to the heart.

3 Q Did Johnny Moore have that condition?

4 A He did.

5 Q And did you find that in your autopsy?

6 A I did.

7 Q I think you labeled it severe atherosclerotic
 8 heart disease.

9 A Yes, I did.

10 Q And if we want to shorten that so we don't have to
 11 pronounce it every time, what can we call that?

12 A You can call it coronary artery disease or you can
 13 call it ASHD, which is what we call it.

14 Q His heart disease, would that be called severe
 15 coronary heart disease?

16 A Could be as well. That's another term for that.

17 Q Did Johnny Moore have severe coronary heart
 18 disease?

19 A Yes.

20 Q And your findings on autopsy were, A, that he had
 21 an 80 to 85 percent stenosis of the left anterior
 22 descending coronary artery. Is that correct?

23 A Yes.

24 Q Johnny Moore had a 75 percent stenosis of the
 25 right coronary artery. Is that correct?

30

1 heart continues to beat in a regular fashion.

2 It's a failsafe situation because it's so
 3 important to have a normal heartbeat.

4 Q And what, in terms of the big picture, interferes
 5 with a normal heartbeat?

6 A Well, trauma can interfere with a normal heart-
 7 beat, of course. Also, the lack of oxygen to the heart is
 8 extremely important in causing a disruption of the heart
 9 rhythm. So if the heart doesn't get enough oxygen, then
 10 arrhythmia or dysrhythmias ensue after that. The heart is
 11 very, very sensitive to lack of oxygen.

12 Also, chemical things can happen as well, such as
 13 electrolyte imbalances and so forth. Too high potassium.
 14 Something wrong with the calcium level in the blood. That
 15 kind of thing can also cause arrhythmias in the heart.

16 Q What is the most common cause of death in the
 17 United States?

18 A Atherosclerotic heart disease.

19 Q What does that mean, atherosclerotic heart disease?

20 A Atherosclerotic heart disease means that there's a
 21 build-up of fatty plaque in the coronary arteries of the
 22 heart. The coronary arteries are found on the surface of
 23 the heart, and they supply blood and oxygen and nutrients
 24 to the heart muscle itself. So if there is a build-up of
 25 this plaque material in the heart, that causes obstruction

29

1 A Correct.

2 Q Would you describe the heart disease of Johnny
 3 Moore. You talk about the three branches. Can you give us
 4 a brief lay view of what heart disease you observed Johnny
 5 Moore had on autopsy.

6 A When I was examining the heart, what you do is cut
 7 through the coronary arteries about one to two millimeters,
 8 every one to two millimeters. Every one to two millimeters
 9 I'll make a cut and look to see what the coronary artery
 10 looks like there. And on Johnny Moore I could see that
 11 there was atherosclerotic plaque. That is, it looks pale
 12 yellow. And in his case there was also calcification or
 13 calcium deposits. That made them very hard. The coronary
 14 arteries were very hard due to that atherosclerotic build-
 15 up. And when we look at the coronary artery, we attempt to
 16 make an estimate about how narrow it is. And any time you
 17 do an autopsy, that is the only way you decide about
 18 coronary artery disease, is making that estimate.
 19 We don't actually take a callipers out and measure it.

20 The estimate I made was 80 to 85 percent stenosis
 21 for the coronary arteries in the left anterior descending
 22 artery and 75 percent stenosis in the right coronary
 23 artery. And that was based on that serial sectioning or
 24 serial cutting through the coronary arteries themselves.

25 Q In your opinion, based on reasonable medical

31

plaque

1 probability, did Johnny Moore's heart disease subject him
 2 to risk?
 3 A Yes.
 4 Q What kind of risks?
 5 A There was the risk of having angina or heart pain.
 6 There's a risk of the myocardial infarct; that is, lack of
 7 blood flow to the heart muscle, which causes the heart
 8 muscle to die. And there was a risk of sudden cardiac
 9 arrhythmia as well.
 10 Q With respect to the arrhythmia, that's the beating
 11 of the heart?
 12 A Rhythm is the beating of the heart. And so a
 13 normal rhythm is fine. But arrhythmia means a misbeat of
 14 the heart or an abnormal heart rhythm.
 15 Q And you talked about some things you can see on
 16 autopsy and some things you cannot see. Is that correct?
 17 A Correct.
 18 Q Can you see evidence of a misbeat?
 19 A No.
 20 Q And why is that, Dr. Gunson?
 21 A Well, it's a dynamic event. The heart is beating
 22 during life, and you can on EKG, or even by checking
 23 somebody's pulse, detect an arrhythmia or misbeat of the
 24 heart. However, once the heart stops beating, then we no
 25 longer can find the arrhythmia. It's gone away. And we

1 have to always detect arrhythmias while a person is alive.
 2 Q Is it consistent with your autopsy findings, based
 3 on a reasonable medical probability, that there could have
 4 been a lack of awareness or responsiveness of Johnny Moore
 5 before impact with the guardrail?
 6 A I can't say one way or the other, you know. I
 7 don't know.
 8 Q And why is that, Dr. Gunson?
 9 A Because I can't see an arrhythmia, or any type
 10 of arrhythmia. And I cannot see any reason for him to be
 11 unconscious, you know, as far as a stroke or something
 12 like that. So I can't say whether or not he could be
 13 unconscious or not unconscious prior.
 14 Q In other words, you cannot rule it out on autopsy?
 15 A That's correct.
 16 Q And if there were observations of lack of
 17 responsiveness, what would be the medical explanation
 18 consistent with your autopsy; a medical explanation?
 19 A One explanation is that he has suffered some type
 20 of arrhythmia. And I rule out ventricular fibrillation for
 21 reasons that we have discussed.
 22 But there can be other arrhythmias that might
 23 cause him to be unresponsive. One of them being
 24 tachycardia, or a fast heart rate. One of them perhaps
 25 being bradycardia, or slow heart rate, where the blood is

1 not being pumped sufficiently to his brain to maintain
 2 consciousness.
 3 And then there's a myriad of other things not
 4 related to the heart, such as some type of metabolic event,
 5 some type of heat-related event, because he had complained
 6 of that. It could even be something like a stroke-like
 7 event that I'm not seeing because he died so suddenly from
 8 it.
 9 I think that is sort of remote, but it's a
 10 possibility.
 11 So there are even times when we do autopsies on
 12 people and we see absolutely no reason for them to die, and
 13 yet they have dropped dead suddenly and unexpectedly right
 14 in front of someone, and we find no physical cause of
 15 death. So ours is not a perfect science.
 16 Q In the death certificate did Dr. Ople put down any
 17 other item of significance beyond the injuries that you
 18 found?
 19 A Yes. He put atherosclerotic heart disease in part
 20 2, or other contributing conditions.
 21 Q One of your findings was that there was no
 22 evidence of recent myocardial infarct. And if Johnny Moore
 23 had suffered a myocardial infarct in the few seconds before
 24 impact, would that show on autopsy?
 25 A No, it would not.

1 Q Why not, Doctor?
 2 A It takes about eight to twelve hours for a
 3 myocardial infarct to become apparent. And the reason for
 4 that is because myocardial infarct is just where there's
 5 dead tissue in the heart. And it does not express itself
 6 as dead tissue unless the person lives at least eight to
 7 twelve hours after suffering the event, after suffering the
 8 cardiac event, or lack of blood flow to that particular
 9 part of the heart. So physically I can't see anything.
 10 And what we see is a sudden cardiac event. That is, they
 11 die suddenly and unexpectedly from an arrhythmia.
 12 Q Is it true, Dr. Gunson, that you cannot predict
 13 when a person is going to have a cardiac arrhythmia or
 14 misbeat?
 15 A No. I certainly can't.
 16 Q In other words, so it is true.
 17 A It is true; yes.
 18 Q And you cannot see cardiac arrhythmia on autopsy.
 19 A That's correct.
 20 Q Is it true, Dr. Gunson, that in 50 percent of the
 21 people with coronary artery disease such as Johnny Moore,
 22 the first symptom is sudden death?
 23 A Yes.
 24 MR. SMITH: Objection. Lack of foundation.
 25 THE WITNESS: Yes. That's true.

1 BY MR. HARREL:
 2 Q Let me ask you, Dr. Gunson, a different way.
 3 When people have the severe coronary artery
 4 disease of Johnny Moore, what symptoms do they experience,
 5 and how many patients experience symptoms and how many do
 6 not?
 7 A Well, about 50 percent of the patients will
 8 experience chest pain or angina from their heart disease,
 9 from their coronary artery disease. But 50 percent of the
 10 people who have severe coronary artery disease, their first
 11 symptom is sudden death. And the reason they die suddenly
 12 is from a cardiac arrhythmia.
 13 Q And, Dr. Gunson, with respect to the term, quote
 14 unquote, sudden death, there can be seconds going by while
 15 things are happening in the body. In other words -- is it
 16 always an immediate event, or, depending on the arrhythmia,
 17 it can take some time?
 18 A Well ---
 19 MR. SMITH: Object. Vague. *out*
 20 BY MR. HARREL:
 21 Q Let me ask you this, Dr. Gunson. With respect
 22 to arrhythmia, tell me the events such as tachycardia and
 23 bradycardia and others, what happens over time?
 24 A With respect to arrhythmias which can cause
 25 death or which cause changes, tachycardia will not kill

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1 immediately. Tachycardia can cause death over time because
 2 it's ineffective blood flow. And the same goes for
 3 bradycardia, which is slow heartbeat. Over time it can
 4 cause death because the body is not getting enough blood
 5 and oxygen.
 6 Generally speaking, with those two types of
 7 arrhythmia, unconsciousness occurs at some point, depending
 8 on the blood flow. Ventricular fibrillation, on the other
 9 hand, which is that quivering of the heart, and which
 10 results in no blood flow, you probably have no more than
 11 about ten seconds or so. Because that's how much blood and
 12 oxygen is in your brain at any given time. And if it's not
 13 replenished all the time, then you become unconscious.
 14 Q Does unconsciousness always mean the same thing,
 15 or can there be stages of beginning lack of awareness,
 16 beginning lack of responsiveness, as any kind of arrhythmia
 17 might be happening?
 18 MR. SMITH: Objection.
 19 I'm sorry. Finish the question.
 20 BY MR. HARREL:
 21 Q Can you explain whether there are any differences.
 22 MR. SMITH: Objection. Leading.
 23 THE WITNESS: I'm not sure I can answer that.
 24 When I think of unconsciousness, I, of course, am thinking
 25 of unconsciousness that leads to death. And in those

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1 cases, sudden unconsciousness results in sudden collapse
 2 and unawareness of whatever from the very beginning.
 3 Though there are types of unconsciousness where people say,
 4 I don't feel right, things are getting dark, you know, that
 5 kind of thing. Say when somebody has been shot and they're
 6 beginning to lose blood rapidly. They're becoming
 7 unconscious, but they have that period of time when other
 8 symptoms occur. So I'm not sure I would call that
 9 transition time unconsciousness.
 10 When I say unconscious, I mean this person is no
 11 longer aware or acting in any way. So there might be a
 12 transition period towards unconsciousness, as the blood
 13 flow ebbs.
 14 BY MR. HARREL:
 15 Q As part of your practice, have you had situations,
 16 particularly in motor vehicle accidents, where it appeared
 17 that there was some medical event, but on your autopsy it
 18 was difficult to determine what caused the lack of
 19 awareness or responsiveness?
 20 MR. SMITH: Objection. Leading.
 21 THE WITNESS: Yes, I have.
 22 BY MR. HARREL:
 23 Q And why is that something that happens?
 24 MR. SMITH: Again, continuing objection. Leading.
 25 THE WITNESS: Well, you know, sometimes we'll have

38

1 somebody who rolls to a stop in a car and maybe gently
 2 impact something. And we do an autopsy. Generally
 3 speaking, when we do an autopsy on those people, we do find
 4 a medical condition such as heart disease. There are times
 5 when, not only in those cases, but in other cases, where a
 6 young person might suddenly collapse at home, where we do
 7 a complete autopsy and toxicology and microscopic exam-
 8 ination, and find absolutely no reason for them to have
 9 died.
 10 MR. HARREL: I have nothing further, Dr. Gunson.
 11 MR. SMITH: I think we're done.
 12
 13 (Further deponent saith not.)
 14
 15
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 20
 21
 22 (As a matter of firm policy, the stenographic notes and
 23 computerized backup of this transcript will be destroyed
 24 five years from the date appearing on the following
 25 certificate unless notice is received otherwise from any
 party or counsel hereto on or before said date of April 17,
 2014.)

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE**

**KAREN MOORE and the ESTATE
OF JOHNNY C. MOORE,**
Plaintiffs,

vs

**HARLEY DAVIDSON MOTOR
COMPANY GROUP, INC. et al.**
Defendants.

NO. 07-2-07358-8

**Declaration of Douglas J. Barovsky
Regarding Harley Davidson's Discovery
Request**

**THE UNDERSIGNED declares under penalty of perjury of the State of Washington
that the following is true and correct:**

My name is Douglas J. Barovsky. I am a professionally licensed electrical engineer
employed by MDE, Inc. My resume is attached.

MDE, Inc. is a multi-discipline forensic engineering firm specializing in failure
analysis, accident reconstruction and investigation. We commonly provide expert witness
testimony in court cases, and have been hired by the plaintiffs in this case to act as experts
in connection with the Harley Davidson accident which gave rise to claims asserted here.

MDE, Inc. is based in Seattle, Washington. We have served clients both nationally
and internationally for over twenty years. Our areas of expertise include but are not limited
to fire and explosion investigation, mechanical engineering, metallurgical engineering,
electrical engineering, accident reconstruction, civil and structural engineering.
Additionally, we maintain a full forensics laboratory and a fully equipped research and
testing facility where we can conduct small to full-scale reconstructions.

Barovsky Declaration

Page 1

**Law Offices of David Smith, PLLC
201 St. Helens Avenue
Tacoma, WA 98402
Phone (253) 272-4777
Fax (253) 461-8888**

EXHIBIT B

1 Engineers at MDE, Inc. also have some considerable experience, personally and
2 professionally with motorcycles and their operation.

3 I have been provided with a copy of proposed protocol for testing of the 40 amp
4 main circuit breaker currently installed in the Moore motorcycle. The 40 amp circuit
5 breaker is, insofar as I know, the 40 amp circuit breaker installed at the time of the accident
6 which is the subject of this action.

7 An important issue in this case involves operation of the main circuit breaker
8 installed in the Moore's Harley Davidson motorcycle. There is abundant information on
9 the Internet of a recognized defect which involves placement of the 40 amp main circuit
10 breaker in some Harley Davidson motorcycles. I have been provided with the attached
11 recall notice, indicating that Harley Davidson is aware that the original equipment 40 amp
12 main circuit breakers may open under certain riding conditions; resulting in shutting down
13 the engine at unpredictable and unexpected times.

14 I am aware that Harley Davidson has already road tested the Moore motorcycle with
15 its experts in an effort to collect an array of data. I have been provided with data which
16 purports to be the data collected by Harley Davidson. Harley Davidson now wants to
17 conduct additional testing.

18 Very generally, Harley Davidson intends to place the circuit breaker in an
19 environmental chamber and subject the circuit breaker to rising ambient temperatures, all
20 the while running near full rated current through the circuit breaker in an effort to trip or
21 open the circuit breaker contacts. The precise protocol that has been provided to me for
22 review is attached.

23 I also understand that Ms. Moore's lawyers wish to delay Harley Davidson's
24 proposed testing until they can perform their own road tests in an effort to duplicate the
25 circuit breaker failure which they believe caused the accident. This road testing will occur
this spring on a warm, sunny day which is similar to the conditions at the time of the
accident.

The court should be aware that because the circuit breaker is heat sensitive; that is, it
opens and closes depending on the surrounding air temperature and the current running
through it, it is important to replicate the conditions existing at the time of the accident. A
small deviation in ambient air temperature or the current running through it might be all
that's required for this circuit breaker to trip or remain closed. Harley Davidson's testing

Barovsky Declaration

Page 2

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1 occurred in November on a day considerably colder than information I have about the day
2 of the accident, as such, Harley Davidson's testing likely did not accurately replicate the
3 conditions at the time of the accident.

4 Other information provided to me with Harley Davidson's test data reveal flaws in
5 their testing. For example, Harley Davidson admits that one of the wires for its test
6 equipment was broken. This fact alone calls into question the validity of Harley Davidson's
7 own road testing. Accordingly, the proposed road testing by Ms. Moore's attorneys is not
8 simply duplicative of the testing Harley Davidson has already performed.

9 As to the new circuit breaker testing being proposed by Harley Davidson, I think it
10 wise to delay the testing until after Ms. Moore's road testing for several reasons:

11 First, at MDE, as indicated, we have a full-service forensic laboratory. Although very
12 stringent precautions are taken, no procedure is truly risk-free when it comes to loss or
13 accidental destruction or alteration of objects being tested. If, as Harley Davidson asserts,
14 there is no problem with their circuit breaker design and construction, then further road
15 testing won't materially affect their ability to conduct the specific circuit breaker testing
16 that they have proposed. If the circuit breaker is removed from the Moore motorcycle and
17 is accidentally lost or destroyed or altered by the test procedure, there will be no way to ever
18 road test the Moore motorcycle under conditions similar to those on the day of the accident.

19 Second, one question that remains unresolved is whether this particular circuit
20 breaker tripped on the day of the accident. One method of examining a circuit breaker for
21 tripping is to open it and physically examine the contact surfaces. Electrical arcing occurs
22 in every circuit breaker that is tripped under load (i.e. if current is flowing through it). This
23 arcing is evident by microscopic damage to the contact surfaces. Harley Davidson's
24 proposed testing will - without question - trip the circuit breaker under near full rated load
25 current. In fact the testing protocol is specifically designed to cause tripping of the circuit
26 breaker under near full rated load current and to measure the temperature at which that
27 occurs. Once Harley Davidson conducts its testing, it will likely be impossible to determine
28 whether the microscopic damage attributable to tripping is a result of Harley Davidson's
29 test or the failure on the day of the accident.

30 I am aware that Harley Davidson asserts that every circuit breaker it puts in any
31 motorcycle is tripped during pre-delivery testing at the factory; it is my opinion that Harley
32 Davidson has not provided substantive documentation to support this assertion. All I can
33 tell the court is that if the proposed Harley Davidson circuit breaker testing occurs, there
34 will be no way to ever determine from examination of the circuit breaker whether it was
35

Barovsky Declaration

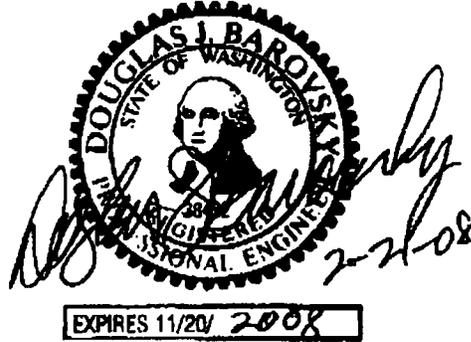
Page 3

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previously tripped or whether the telltale damage is attributable to the testing currently under consideration.

DATED at Seattle, WA this 21 day of February, 2008.



Douglas J. Barovsky, P.E.

April 15 2009 11:12 AM

KEVIN STOCK
COUNTY CLERK
WORL April 17, 2009 9:00 AM
NO: 07-2-07358-8

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE**

**KAREN MOORE and the ESTATE OF
JOHNNY C. MOORE**

Plaintiffs,

v.

NO. 07 2 07358 8

**HARLEY-DAVIDSON MOTOR COMPANY
GROUP, INC. d/b/a HARLEY-DAVIDSON
MOTOR COMPANY, a Wisconsin State
Corporation; DESTINATION MOTORCYCLES
TACOMA, LLC d/b/a DESTINATION
HARLEY-DAVIDSON, a Washington State
Limited Liability Company,**

Defendants.

**DECLARATION OF
LARRY HEJLIK**

LARRY HEJLIK, declares as follows:

1. My name is Larry Hejlik. I am over 18 years of age and competent to make this Declaration based on personal knowledge.
2. I am employed by Harley-Davidson Motor Company Group, Inc. ("Harley-Davidson") as a Principal Engineer and am familiar with the facts of this case.
3. To test the temperature proximate to the circuit breaker and the current flowing across the circuit breaker I, along with other representatives from Harley-Davidson, performed ride-testing of the subject motorcycle using a data acquisition unit to record the

1 amount of current flowing across the circuit breaker, temperature near the circuit breaker,
2 ambient temperature, engine speed and vehicle speed. The data acquisition equipment used
3 to record this data is widely used in the aerospace, automotive and motorcycle industries to
4 record such data. Attached to this declaration as Exhibit A is literature from the
5 manufacturer of the data acquisition equipment including a list of the various manufactures
6 that use their equipment to perform similar data acquisition.
7

8 4. To determine the temperature at which the subject circuit breaker would trip
9 considering the known temperature on the day of the Moores' accident and the thermal and
10 current profile of the subject motorcycle I traveled to GT Engineering, where employees of
11 GT Engineering performed testing based on testing procedures set forth in SAE, Surface
12 Vehicle Standard J553. A copy of SAE Standard J553 is attached to this Declaration as
13 Exhibit B.

14 5. SAE compiles and publishes generally accepted engineering standards.

15 6. SAE J553 states that it "defines the test conditions, procedures and performance
16 requirements for circuit breakers in ratings up to and including 50 A."

17 7. SAE J553 recognizes that circuit breakers are "overcurrent protective devices,
18 responsive to electric current and to temperature."
19

20 8. The testing at GT Engineering followed the testing requirements set forth in SAE
21 J553. The testing generally followed the testing procedure entitled "No Current Trip and
22 Reset Temperature Test Procedure." However, rather than testing the circuit breaker
23 without any current, the GT Engineering testing applied a current level of 30 amps, which is
24 above the average current observed in ride-testing the Moore motorcycle under conditions
25 approximating those on the day of the Moores' accident.

1 9. The tested 30 amp current level is higher than the current ever recorded to cross
2 the circuit breaker during testing of the subject motorcycle, except when the motorcycle was
3 started, and that current level only barely and briefly exceeded 30 amps.

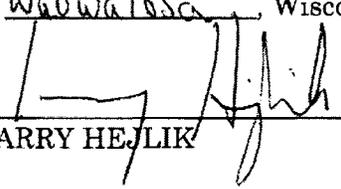
4 10. The current level across the circuit breaker is typically highest when the
5 motorcycle is started because electricity is causing the engine to turn.

6 11. The brief higher level of current observed, which was slightly higher than 30
7 amps, when the engine started could not have caused a quit while running event here . The
8 higher level of current was too brief and not sufficiently high to cause the circuit breaker to
9 trip. In addition, once the motorcycle was running, the current level across the circuit
10 breaker was below 30 amps.

11 12. The variation in temperature proximate to the circuit breaker recorded during
12 the ride-testing is not a factor. Even considering the maximum temperature reached,
13 including any fluctuation, the temperature proximate to the circuit breaker was never high
14 enough to cause the 40 amp circuit breaker to trip.

15
16 I DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF THE
17 STATES OF WASHINGTON AND WISCONSIN THAT THE FOREGOING IS TRUE AND
18 CORRECT
19

20 Dated this 15th day of April, 2009 at Wauwatosa, Wisconsin.

21
22 
23 _____
24 LARRY HEJLIK
25

Condensed Transcript

**SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE**

**KAREN MOORE and the
ESTATE OF JOHNNY C. MOORE,**

Plaintiffs,

Vs.

NO. 07 2 07358 8

**HARLEY-DAVIDSON MOTOR COMPANY
GROUP, INC., d/b/a HARLEY-DAVIDSON
MOTOR COMPANY, a Wisconsin State
Corporation; DESTINATION MOTORCYCLES
TACOMA, LLC d/b/a DESTINATION
HARLEY-DAVIDSON, a Washington
State Limited Liability Company,**

Defendants.

~~~~~

**DEPOSITION OF  
GREGORY J. SPANGLER**

**April 8, 2009  
3:02 p.m.**

**FAS Controls, Inc.  
1100 Airport Road  
Shelby, North Carolina**

**Counsel for the Defendants  
CINDY A. HAYDEN, RMR, CRR**



**DEPONENT**

**EXHIBIT D**

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| <p style="text-align: center;">1</p> <p>SUPERIOR COURT OF WASHINGTON<br/>COUNTY OF PIERCE</p> <p>KAREN MOORE and the<br/>ESTATE OF JOHNNY C. MOORE,<br/>Plaintiffs,<br/>Vs. <span style="float: right;">NO. 07 2 07358 8</span><br/>HARLEY-DAVIDSON MOTOR COMPANY<br/>GROUP, INC., d/b/a HARLEY-DAVIDSON<br/>MOTOR COMPANY, a Wisconsin State<br/>Corporation; DESTINATION MOTORCYCLES<br/>TACOMA, LLC d/b/a DESTINATION<br/>HARLEY-DAVIDSON, a Washington<br/>State Limited Liability Company,<br/>Defendants.</p> <p>DEPOSITION OF: GREGORY J. SPANGLER<br/>DATE: April 8, 2009<br/>TIME: 3:02 p.m.<br/>LOCATION: FAS Controls, Inc.<br/>1100 Airport Road<br/>Shelby, North Carolina<br/>TAKEN BY: Counsel for the Defendants<br/>REPORTED BY: CINDY A. HAYDEN, RMR, CRR</p>                                                                                                                                                                                 | <p style="text-align: center;">3</p> <p>1 (Commencing at approximately 3:02 p.m.)<br/>2 GREGORY J. SPANGLER<br/>3 being first duly sworn, testified as follows:<br/>4 MR. GULBRANDSEN: Okay. I guess at the<br/>5 outset I just want to say that this -- this is a<br/>6 telephonic deposition that's being taken by<br/>7 permission of the Court for the sole purpose of<br/>8 laying the foundation for a document entitled FASCO<br/>9 Controls Circuit Breaker Rerating Curve Snap<br/>10 Circuit Breaker Type 1-1711-40A, and in this case<br/>11 it's Bates labeled H-D 00753.<br/>12 EXAMINATION<br/>13 BY MR. GULBRANDSEN:<br/>14 Q. Good afternoon, Mr. Spangler. Can you<br/>15 state your name, please.<br/>16 A. Greg Spangler.<br/>17 Q. Mr. Spangler, we've met before. My<br/>18 name is Lars Gulbrandsen. I represent the<br/>19 defendants Harley-Davidson and Destination<br/>20 Harley-Davidson in this case. And as I said,<br/>21 we're -- we're going to have a short deposition<br/>22 here to just talk about this document. And because<br/>23 we're all on the phone, just a brief instruction.<br/>24 It might make sense for you to wait a beat after I<br/>25 ask a question, and I'll try and do likewise, and</p> |
| <p style="text-align: center;">2</p> <p>1 APPEARANCES OF COUNSEL:<br/>2 ATTORNEYS FOR THE PLAINTIFFS<br/>3 KAREN MOORE and the ESTATE OF JOHNNY C.<br/>4 MOORE:<br/>5 LAW OFFICES OF DAVID SMITH, PLLC<br/>6 BY: DAVID SMITH (via phone)<br/>7 JOHN MILLS (via phone)<br/>8 201 St. Helens Avenue<br/>9 Tacoma, Washington 98402<br/>10 (253) 272-4777<br/>11 david@davidsmith.com<br/>12<br/>13 ATTORNEYS FOR THE DEFENDANTS<br/>14 HARLEY-DAVIDSON MOTOR COMPANY GROUP,<br/>15 INC., d/b/a HARLEY-DAVIDSON MOTOR<br/>16 COMPANY, a Wisconsin State Corporation;<br/>17 DESTINATION MOTORCYCLES TACOMA, LLC<br/>18 d/b/a DESTINATION HARLEY-DAVIDSON, a<br/>19 Washington State Limited Liability<br/>20 Company:<br/>21 QUARLES &amp; BRADY, LLP<br/>22 BY: LARS GULBRANDSEN (via phone)<br/>23 411 East Wisconsin Avenue<br/>24 Suite 2040<br/>25 Milwaukee, Wisconsin 53202<br/>(414) 277-5137<br/>lg9@quarles.com</p> <p>(INDEX AT REAR OF TRANSCRIPT)</p> | <p style="text-align: center;">4</p> <p>1 then if Mr. Smith has any questions, the same, just<br/>2 so we don't get the court reporter confused. Is<br/>3 that okay with you?<br/>4 A. Yes.<br/>5 Q. Mr. Spangler, where are you employed?<br/>6 A. Presently FAS Controls, Incorporated,<br/>7 1100 Airport Road, Shelby, North Carolina.<br/>8 Q. What is the business of FAS Controls?<br/>9 A. We manufacture automotive components,<br/>10 including valves, mechanical and pressure switches<br/>11 and circuit breakers.<br/>12 Q. Was FAS Controls ever owned by any<br/>13 other corporate entity?<br/>14 A. Yes, it has been several, including<br/>15 Honeywell.<br/>16 Q. Can you briefly, very briefly describe<br/>17 what your position is at FAS Controls?<br/>18 A. Yeah. Presently I'm a new product<br/>19 development engineer, so I work with customers to<br/>20 develop new products to meet whatever their needs<br/>21 are.<br/>22 Q. Mr. Spangler, do you have in front of<br/>23 you a declaration that you signed in this case on<br/>24 March 24th, 2009?<br/>25 A. Yes, I do.</p>                                                                                                                                   |



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| <p>5</p> <p>1 Q. And is it a copy of the declaration or<br/>2 is it the original declaration?<br/>3 A. It is the original declaration, I<br/>4 believe.<br/>5 Q. Okay. Does -- does the declaration<br/>6 have an Exhibit A attached to it?<br/>7 A. Yes, it does.<br/>8 Q. And do you have that Exhibit A attached<br/>9 with you today?<br/>10 A. Yes, I do.<br/>11 (SPANGLER EXH. 204, DECLARATION OF GREG<br/>12 SPANGLER WITH EXHIBIT A, was marked for<br/>13 identification.)<br/>14 MR. GULBRANDSEN: I've already asked<br/>15 the court reporter to mark the declaration<br/>16 including the Exhibit A as Exhibit 204. Has that<br/>17 been done?<br/>18 THE WITNESS: Yes.<br/>19 BY MR. GULBRANDSEN:<br/>20 Q. Okay. Looking at Exhibit 204, I want<br/>21 to direct your attention specifically to Exhibit A.<br/>22 And we'll refer to that document because I don't<br/>23 want to get confused referring to Exhibit A to<br/>24 Exhibit 204. We'll just refer to it as the FASCO<br/>25 graph. Are you familiar with that document?</p>                                                                                                                            | <p>7</p> <p>1 Q. And was it created by a person with<br/>2 knowledge regarding the data represented in the<br/>3 graph?<br/>4 A. I believe so, yes.<br/>5 Q. Can you describe how the -- how the<br/>6 FASCO graph was created?<br/>7 A. Yes. During our circuit breaker<br/>8 development we manufacture many -- and develop many<br/>9 different kinds of circuit breakers, and during the<br/>10 course of that development, we test the breakers to<br/>11 ensure that they meet certain specifications,<br/>12 customer specifications, and one of those that is<br/>13 typically needed or requested by customers is<br/>14 similar rerating curves that describe how the<br/>15 breakers function over temperature. So to do so we<br/>16 gather a group of parts that we manufacture at<br/>17 different ranges of our manufacturing limits,<br/>18 usually a high and low manufacturing limit range,<br/>19 and we test groups of those parts over temperature<br/>20 to get the data to generate these types of graphs.<br/>21 Q. And you kind of touched on this in your<br/>22 last answer, but can you -- can you explain why the<br/>23 FASCO graph was created?<br/>24 A. Yes. It's primarily a communication<br/>25 tool for our customers so that they can understand</p> |
| <p>6</p> <p>1 A. Yes, I am.<br/>2 Q. What is it?<br/>3 A. It's a rerating curve that describes<br/>4 how circuit breakers we manufacture perform over<br/>5 temperature ranges versus current.<br/>6 Q. And how do you know what -- what it is?<br/>7 A. Years ago I worked as an engineer in<br/>8 the circuit breaker department, and I became<br/>9 familiar with these rerating curves during that<br/>10 time frame.<br/>11 Q. Did you -- did you do anything to --<br/>12 this -- this -- this FASCO graph -- the copy of the<br/>13 FASCO graph that's attached -- attached to your<br/>14 declaration, that's something I e-mailed to you,<br/>15 correct, or -- the -- the version of the -- of the<br/>16 FASCO graph that's attached to your declaration,<br/>17 how did you get that document?<br/>18 A. Yes, the version that's attached to the<br/>19 declaration is one that you e-mailed to me, and<br/>20 then at that point in time I cross-referenced it<br/>21 with our files and found the same -- a personal<br/>22 copy I had matching it.<br/>23 Q. Was the FASCO graph created in the<br/>24 regular course of business?<br/>25 A. At the time, yes.</p> | <p>8</p> <p>1 how specific breakers are affected by the<br/>2 temperature of the environment around the circuit<br/>3 breaker.<br/>4 Q. Was the FASCO graph created for<br/>5 litigation?<br/>6 A. No, it was not.<br/>7 Q. Does the FASCO graph reflect data from<br/>8 testing that was recorded at or near the time the<br/>9 testing took place?<br/>10 A. Yes.<br/>11 MR. SMITH: Object to the form of the<br/>12 question. You haven't laid a foundation about as<br/>13 to when the --<br/>14 MR. GULBRANDSEN: I don't need your --<br/>15 your explanation.<br/>16 MR. SMITH: Well, this is going to go<br/>17 in front of the court; is that correct, Lars?<br/>18 MR. GULBRANDSEN: I guess it is.<br/>19 You're right. Go ahead.<br/>20 MR. SMITH: The -- the objection is you<br/>21 haven't laid a foundation about the date when the<br/>22 document -- or when this testing had occurred or<br/>23 when the document was created. It's a<br/>24 foundation --<br/>25 MR. GULBRANDSEN: Okay. I'm just</p>                                                                                                                                                                                                                                                                     |



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1 thinking for a second.  
 2 BY MR. GULBRANDSEN:  
 3 Q. Mr. Spangler, do you know when the  
 4 document was created?  
 5 A. I have a general idea of when the graph  
 6 was created. I don't know specifically when the  
 7 data was taken that was used to generate the graph.  
 8 Q. Is your -- but you're -- are you  
 9 familiar with the -- the practices and procedures  
 10 of -- of testing that would form this type of --  
 11 that would go into this type of graph?  
 12 A. Yes, to a certain degree I am.  
 13 Q. And based on that familiarity, do  
 14 you -- can you testify that the data that was  
 15 recorded that went into this graph would have been  
 16 recorded at or near the time the testing took  
 17 place?  
 18 A. I can speculate --  
 19 MR. SMITH: I'm sorry. I'm going to  
 20 object to the form of the question because we  
 21 haven't established when the testing took place.  
 22 MR. GULBRANDSEN: Yeah, I'm -- but I  
 23 don't -- what I'm asking him is based on the  
 24 procedures of FAS, would the testing have been  
 25 recorded -- the data from the testing been recorded

10

1 at or near the time of the testing. He's testified  
 2 that he's familiar with those practices.  
 3 MR. SMITH: Well, we -- but, again -- I  
 4 object to the form of the question because --  
 5 MR. GULBRANDSEN: I'm asking based --  
 6 please don't talk over me. We're on the phone.  
 7 MR. SMITH: We don't -- I'm sorry. Go  
 8 ahead and finish what you're saying, Lars.  
 9 MR. GULBRANDSEN: So -- so I'm asking  
 10 him based on the practices and procedures would the  
 11 data have been recorded at or near the time the  
 12 testing was preferred.  
 13 A. It's general practice for --  
 14 MR. SMITH: I didn't talk over you. I  
 15 need to object. If you're finished Lars, I'm going  
 16 to object.  
 17 MR. GULBRANDSEN: I'm finished.  
 18 MR. SMITH: I'm objecting to the form  
 19 of the question because you haven't laid a  
 20 foundation about the -- I think what you're asking  
 21 is the time frame between the -- the -- doing the  
 22 test and producing the chart, and you haven't laid  
 23 a foundation about when the chart was created, nor  
 24 have you laid a foundation about when the testing  
 25 occurred.

11

1 MR. GULBRANDSEN: Well, I think that's  
 2 different than what I'm asking, but go ahead and  
 3 answer, Mr. Spangler.  
 4 A. What I was going to say was to your  
 5 original question, general practice, yes, the data  
 6 was taken at the time the test was run. That's  
 7 pretty standard. What I can't say is how that  
 8 relates to when the graph was created. We have an  
 9 approximate date on when the graph was created,  
 10 which is 1996, based on the number at the bottom of  
 11 the chart; however, I don't know when the data used  
 12 to create that graph was taken.  
 13 Q. Are you familiar with the types of  
 14 documents that other circuit breaker manufacturers  
 15 maintain in the regular course of business?  
 16 MR. SMITH: Objection, relevance.  
 17 A. Some, yes. Some documents I am, yes.  
 18 Q. And do you know whether other  
 19 manufacturers of 40 amp circuit breaker maintain  
 20 documents similar to the FASCO graph?  
 21 MR. SMITH: Objection, foundation.  
 22 A. Yes, I believe they do.  
 23 Q. Is the FASCO graph the type of document  
 24 that can -- that is reasonably relied on by your  
 25 customers?

12

1 A. Yes, to -- to a given degree.  
 2 Typically in addition to this data, you know, we  
 3 recommend and they typically do application  
 4 testing, but this is a good foundation to start  
 5 that kind of engineering evaluation before you  
 6 actually test the end application.  
 7 MR. SMITH: I object to the form of the  
 8 question. I object to that question. I didn't  
 9 want to interrupt his answer, but I object to that  
 10 question because there's no foundation that's been  
 11 laid regarding the chart itself.  
 12 MR. GULBRANDSEN: I don't understand  
 13 the objection. I think I did lay foundation about  
 14 the chart. I mean, that's what we're doing here.  
 15 MR. SMITH: I don't know how that's  
 16 relevant to foundational issues on the chart, I  
 17 guess.  
 18 MR. GULBRANDSEN: Well, I think -- I  
 19 mean, I think it's relevant to the extent you guys  
 20 are going to object to this chart on ER 1006 we  
 21 think it can come in under ER 703 because it's the  
 22 type of document that's reasonably relied on both  
 23 in the industry and by customers.  
 24 MR. SMITH: Again --  
 25 MR. GULBRANDSEN: Well, that's --



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| <p>13</p> <p>1 that's my response to your objection.<br/>                 2 BY MR. GULBRANDSEN:<br/>                 3 Q. I have one last question, Mr. Spangler,<br/>                 4 and I'm done.<br/>                 5 Did you maintain the FASCO graph in the<br/>                 6 regular course of business?<br/>                 7 A. I did.<br/>                 8 MR. GULBRANDSEN: Those are all the<br/>                 9 questions I have.<br/>                 10 David, if you want to go, go ahead.<br/>                 11 MR. SMITH: All right. Well, I guess I<br/>                 12 want to make sure I make my objection as to the --<br/>                 13 the statement you made regarding the customers' use<br/>                 14 of the chart --<br/>                 15 MR. GULBRANDSEN: Um-hum.<br/>                 16 MR. SMITH: -- you haven't laid any<br/>                 17 foundation as to --<br/>                 18 MR. GULBRANDSEN: You know, we don't<br/>                 19 need to make these objections right now. I mean,<br/>                 20 you can object to the questions, but if that's --<br/>                 21 MR. SMITH: Well, if you intend to use<br/>                 22 this deposition at trial to lay foundation for this<br/>                 23 chart, then I have to -- I have to make my<br/>                 24 objections.<br/>                 25 MR. GULBRANDSEN: Well, you can make</p>                                                                                                                                   | <p>15</p> <p>1 I'm making my objection regarding the question<br/>                 2 that -- as to whether or not Mr. -- the FASCO chart<br/>                 3 was reasonably relied upon by the customers of<br/>                 4 Mr. Spangler, and the objection is as to foundation<br/>                 5 and relevance.<br/>                 6 MR. GULBRANDSEN: Okay. And I guess --<br/>                 7 I mean --<br/>                 8 MR. SMITH: And the foundation and<br/>                 9 relevance -- the issue, just to put it out on the<br/>                 10 table, is we have no foundational evidence that<br/>                 11 shows that the customers actually did rely upon the<br/>                 12 chart in any fashion.<br/>                 13 MR. GULBRANDSEN: Well, I think as far<br/>                 14 as -- I'm not sure that's really an objection to<br/>                 15 this question. I mean, if you're making a<br/>                 16 foundational question to the -- objection to the<br/>                 17 question, he already testified that the purpose of<br/>                 18 this -- of the graph was to provide customers with<br/>                 19 basically specifications for the part, for the<br/>                 20 circuit breaker.<br/>                 21 MR. SMITH: The question was whether or<br/>                 22 not you -- whether the customers relied upon the<br/>                 23 chart.<br/>                 24 MR. GULBRANDSEN: Whether it was<br/>                 25 reasonable for customers to rely on the chart. And</p> |
| <p>14</p> <p>1 your objections at trial. I mean, if -- the chart<br/>                 2 is going to be offered at trial. You guys will<br/>                 3 make your objection, and then, you know, we can --<br/>                 4 we can -- we can play this -- we can read this<br/>                 5 transcript to the judge.<br/>                 6 MR. SMITH: Are you allowing -- let's<br/>                 7 just get straight to it. Are you allowing me to<br/>                 8 preserve all my objections for trial at this point?<br/>                 9 MR. GULBRANDSEN: Not to the questions<br/>                 10 but to the admissibility of the document, yeah, you<br/>                 11 can object at trial.<br/>                 12 MR. SMITH: Well, I'm going to object<br/>                 13 as to the -- this -- the question relating to<br/>                 14 the -- Mr. Spangler or -- I think the question --<br/>                 15 actually I'm going to have the question read back.<br/>                 16 I'm sorry. What was your -- I'm sorry. I don't<br/>                 17 know who the court reporter's name -- could you<br/>                 18 give me your name again?<br/>                 19 COURT REPORTER: Cindy.<br/>                 20 MR. SMITH: Oh, could you read back<br/>                 21 that last question, please.<br/>                 22 (The reporter read the requested<br/>                 23 matter.)<br/>                 24 (Off-the-record conference.)<br/>                 25 MR. SMITH: I just -- for the record</p> | <p>16</p> <p>1 his answer was that it was.<br/>                 2 MR. SMITH: That assumes that the<br/>                 3 customers are relying on the chart.<br/>                 4 MR. GULBRANDSEN: Well, we --<br/>                 5 Harley-Davidson is a customer, and I think<br/>                 6 that's -- that's different testimony --<br/>                 7 MR. SMITH: You didn't say -- you were<br/>                 8 trying to make a general statement about all<br/>                 9 customers. You're not making a statement -- you're<br/>                 10 asking a question about all customers.<br/>                 11 MR. GULBRANDSEN: All right. This is<br/>                 12 my last statement about this, and this is<br/>                 13 worthless. We're just making a goofy record here.<br/>                 14 But I asked him if it was reasonable to rely on<br/>                 15 that. I think he does have the foundation to<br/>                 16 testify whether it's reasonable for their customers<br/>                 17 to rely on a chart that they created.<br/>                 18 MR. SMITH: And my objection is that no<br/>                 19 foundation has been laid regarding that -- those<br/>                 20 customers. Okay. So let's move on.<br/>                 21 MR. GULBRANDSEN: I'm done.<br/>                 22 MR. SMITH: Okay.<br/>                 23 EXAMINATION<br/>                 24 BY MR. SMITH:<br/>                 25 Q. So Mr. Spangler --</p>                                                                                  |



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| <p style="text-align: center;">17</p> <p>1 A. Yes.</p> <p>2 Q. -- can you tell me what was the date</p> <p>3 that you were first employed by FASCO?</p> <p>4 A. I'm thinking. It would have been</p> <p>5 around 1992 or so, but I'd have to check.</p> <p>6 Q. And did you work in the department that</p> <p>7 created -- well, you testified -- you had testified</p> <p>8 that you went through your personnel file -- is it</p> <p>9 a personnel -- personnel file or personal file?</p> <p>10 A. My personal records of work done here.</p> <p>11 Q. And you went through your personal</p> <p>12 records of what you've done there, and you stated</p> <p>13 that you had found this chart; is that a correct</p> <p>14 statement?</p> <p>15 A. That is correct.</p> <p>16 Q. Do you have a copy of your -- your</p> <p>17 personal file there with you today?</p> <p>18 A. Yes, I do.</p> <p>19 Q. Okay.</p> <p>20 MR. SMITH: I'd like to enter that into</p> <p>21 the record as an exhibit. Can we make that</p> <p>22 exhibit --</p> <p>23 MR. GULBRANDSEN: Well, you're going to</p> <p>24 have to copy it. I assume he needs it.</p> <p>25 MR. SMITH: That's fine.</p>                                                                               | <p style="text-align: center;">19</p> <p>1 corresponds to this document. But, I mean, as far</p> <p>2 as going through his file and, you know -- I</p> <p>3 just -- I don't even think we have jurisdiction to</p> <p>4 do that.</p> <p>5 BY MR. SMITH:</p> <p>6 Q. All right. And then -- Mr. Spangler,</p> <p>7 about the chart, do you have the -- do you have the</p> <p>8 chart from your personal file there in front of</p> <p>9 you?</p> <p>10 A. Yes, I do.</p> <p>11 Q. First off, I do want to make the</p> <p>12 record -- I would like to have a copy of your</p> <p>13 personal file because in your declaration</p> <p>14 transcript that I'm looking at -- do you have the</p> <p>15 declaration in front of you, by the way?</p> <p>16 A. Yes, I do.</p> <p>17 Q. If you'd go to Line Number 3 or</p> <p>18 Paragraph 3, Page Number 2. And it says, I confirm</p> <p>19 the authenticity of Exhibit A based upon a</p> <p>20 comparison with similar documents, including a</p> <p>21 document reflecting the same data in my personal</p> <p>22 file.</p> <p>23 A. Yes.</p> <p>24 Q. So I'd like to have a copy of your</p> <p>25 personal file as I would if we were in trial --</p>                                                                                                                                             |
| <p style="text-align: center;">18</p> <p>1 (Off-the-record conference.)</p> <p>2 BY MR. SMITH:</p> <p>3 Q. Mr. Spangler, can you tell me -- what</p> <p>4 is in your personal file there?</p> <p>5 A. I have lots of documents for the</p> <p>6 various rerating charts and time temperature charts</p> <p>7 and some correspondence with other customers in</p> <p>8 this particular file.</p> <p>9 Q. Okay. Are there documents within</p> <p>10 that -- within that file that relate to the -- the</p> <p>11 chart that we're looking at today as Exhibit -- I</p> <p>12 didn't write down the exhibit number? Is it 204?</p> <p>13 MR. SMITH: Cindy, is our exhibit</p> <p>14 Exhibit 204?</p> <p>15 COURT REPORTER: Yes.</p> <p>16 MR. GULBRANDSEN: It's Exhibit 204.</p> <p>17 You know, to the -- I mean, I'm going to object to</p> <p>18 this. You don't have a deposition subpoena out for</p> <p>19 Mr. Spangler and --</p> <p>20 MR. SMITH: But this is</p> <p>21 cross-examination. I think we're allowed --</p> <p>22 MR. GULBRANDSEN: I'm not sure you're</p> <p>23 entitled to any documents. I mean, I don't have a</p> <p>24 problem if it's not too big an imposition on him</p> <p>25 to -- to copy the document that he found that is --</p> | <p style="text-align: center;">20</p> <p>1 MR. GULBRANDSEN: I object.</p> <p>2 BY MR. SMITH:</p> <p>3 Q. -- so I can -- so I can relate what</p> <p>4 you're saying in your declaration to -- to this --</p> <p>5 to this paragraph that you put here.</p> <p>6 MR. GULBRANDSEN: I -- I object. He's</p> <p>7 not under subpoena. He's doing this, you know,</p> <p>8 as -- at a late notice of a deposition. You don't</p> <p>9 have a discovery request out to him. He's not a</p> <p>10 party to the case. You know --</p> <p>11 MR. SMITH: Your -- your objection is</p> <p>12 that we -- basically that we can't have the data.</p> <p>13 MR. GULBRANDSEN: No. My objection is</p> <p>14 we just -- you know, if -- if this were months ago</p> <p>15 and you guys subpoenaed him, fine, but I just --</p> <p>16 you know, he's basically doing this as a favor to</p> <p>17 try and authenticate a document. I just think we</p> <p>18 don't have jurisdiction to force him to do</p> <p>19 anything. So that is fruitless, and I don't want</p> <p>20 to -- I don't want to impose on the witness more</p> <p>21 than we already have.</p> <p>22 MR. SMITH: Yeah, but, I mean, this all</p> <p>23 comes as a surprise to us. I mean --</p> <p>24 MR. GULBRANDSEN: But it's a</p> <p>25 jurisdictional issue, David. I mean, we don't have</p> |



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| <p style="text-align: center;">21</p> <p>1 a subpoena for him.</p> <p>2 MR. SMITH: How would we have</p> <p>3 subpoenaed this gentleman months and months ago if</p> <p>4 we didn't even know he existed? I mean, you just</p> <p>5 gave us him as a witness two weeks ago.</p> <p>6 MR. GULBRANDSEN: But that's not the</p> <p>7 issue.</p> <p>8 MR. SMITH: Yeah, that's the whole</p> <p>9 issue.</p> <p>10 MR. GULBRANDSEN: No. He's not a</p> <p>11 party. I mean, you can't force him to do anything.</p> <p>12 MR. SMITH: Well, he's your witness.</p> <p>13 MR. GULBRANDSEN: He's a witness just</p> <p>14 for authenticating the document. I mean, you can</p> <p>15 argue at trial that it's not -- it's not good</p> <p>16 enough, you know, and I think you are going to</p> <p>17 argue that, but I just don't want to put this guy</p> <p>18 out any more than he already has been.</p> <p>19 MR. SMITH: Well, Mr. Spangler --</p> <p>20 MR. GULBRANDSEN: I think -- I think</p> <p>21 making him copy his entire personal file is</p> <p>22 ridiculous.</p> <p>23 BY MR. SMITH:</p> <p>24 Q. Well, Mr. Spangler, let me ask you a</p> <p>25 different question then. Is it some kind of</p> | <p style="text-align: center;">23</p> <p>1 Q. -- in your personal file?</p> <p>2 A. This particular one 60 pages, but if</p> <p>3 it -- if you want a copy of my personal copy of the</p> <p>4 document that is in Exhibit A, then I can do that.</p> <p>5 Q. Why don't you pull that document -- do</p> <p>6 you have that out -- pulled out in front of you?</p> <p>7 A. Exhibit A?</p> <p>8 Q. Yeah.</p> <p>9 A. Yes.</p> <p>10 Q. And then tell me how -- how does</p> <p>11 Exhibit A look different on your copy than it does</p> <p>12 on the one that you put in your declaration?</p> <p>13 A. The data which is -- is the original</p> <p>14 thing that I checked, the curves on the chart are</p> <p>15 the exact same. The only difference is the</p> <p>16 lettering where it says must hold, may trip, must</p> <p>17 trip is not on my personal copy. But I did verify</p> <p>18 that that is the typical markings for all these</p> <p>19 such charts.</p> <p>20 Q. Okay. Now, at the -- the bottom of the</p> <p>21 one that you're looking at that you're going to</p> <p>22 make a copy for us of -- and I think -- can we</p> <p>23 make -- by the way, can we make a copy of that one</p> <p>24 document and -- and put it in as exhibit? How</p> <p>25 long -- would that just take -- do you have a</p> |
| <p style="text-align: center;">22</p> <p>1 inconvenience for you to copy that file for us</p> <p>2 today?</p> <p>3 A. I'm willing to make a copy of my</p> <p>4 personal record of this specific chart.</p> <p>5 Q. I know, but as to the file in its</p> <p>6 entirety -- how many pages are in your personal</p> <p>7 file there?</p> <p>8 A. Yeah, I'm not interested in doing that</p> <p>9 because it involves correspondence with other</p> <p>10 customers that shouldn't be related to the trial.</p> <p>11 Q. All right. I'm just asking how many</p> <p>12 pages are in the file. Is it -- is it voluminous</p> <p>13 or what is it? How many pages you got there?</p> <p>14 A. It's probably 60 or so pages.</p> <p>15 Q. And how long would it take to copy 60</p> <p>16 pages for us?</p> <p>17 A. Well, I guess -- I'm not at liberty</p> <p>18 to -- to give out those documents without other</p> <p>19 approval from my management or -- yeah, from my</p> <p>20 management, so --</p> <p>21 Q. I know, but I'm just making a record.</p> <p>22 A. Yeah.</p> <p>23 Q. How many pages --</p> <p>24 MR. GULBRANDSEN: That's ridiculous.</p> <p>25 BY MR. SMITH:</p>                        | <p style="text-align: center;">24</p> <p>1 photocopier nearby that you can do that?</p> <p>2 A. Yes, we do.</p> <p>3 Q. Why don't we do that and get it to</p> <p>4 the -- it's Number 205. Give it to Cindy there.</p> <p>5 So let's take a minute and do that.</p> <p>6 A. Okay. One minute.</p> <p>7 (SPANGLER EXH. 205, DOCUMENT TITLED</p> <p>8 FASCO CONTROLS CIRCUIT BREAKER RERATING CURVE SNAP</p> <p>9 CIRCUIT BREAKER TYPE I -- 1711-40A, was marked for</p> <p>10 identification.)</p> <p>11 BY MR. SMITH:</p> <p>12 Q. Okay. So, Mr. Spangler, on your</p> <p>13 version of -- are you looking at Exhibit 205?</p> <p>14 A. Yes.</p> <p>15 Q. And then you had described earlier that</p> <p>16 the must hold, may trip and must trip language was</p> <p>17 not on the version of your document that you held?</p> <p>18 A. That is correct.</p> <p>19 Q. And then at the bottom right-hand</p> <p>20 corner there's a number. It says 96000026. On</p> <p>21 your copy -- on Exhibit 205 does that show up on --</p> <p>22 on yours?</p> <p>23 A. Yes, it does.</p> <p>24 Q. And in the bottom left-hand corner</p> <p>25 there is a -- a fax -- what looks like a fax date</p>                                                                                                                                 |



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| <p>25</p> <p>1 time stamp. Does -- does your copy have the fax<br/>2 date time stamp on there?<br/>3 A. No, it does not.<br/>4 Q. Then in the upper part of the -- upper<br/>5 part of the document on the very top there appears<br/>6 to be some wording. It's cut off on Exhibit 204.<br/>7 On Exhibit 205 do you see anything? It would be<br/>8 above the FASCO Controls circuit breaker rerating<br/>9 curve language.<br/>10 A. You cannot see that on Exhibit 205.<br/>11 Q. Now, in Exhibit 205 on the left-hand<br/>12 side, if you compare Exhibit 205 to Exhibit 204, on<br/>13 the left-hand side you'll see sort of a photocopy<br/>14 line or a line of some kind; do you see that there?<br/>15 On 204 do you see the line?<br/>16 A. Yes.<br/>17 Q. On 205 do you see the same line?<br/>18 A. No.<br/>19 Q. Does 205 -- in the original Exhibit 205<br/>20 does it have any staple marks on it?<br/>21 A. No.<br/>22 Q. Now, as to that number at the bottom on<br/>23 Exhibit Number 204, the 96000026 number, do you<br/>24 know where that number came from?<br/>25 A. In general, yes.</p> | <p>27</p> <p>1 file there do you have another document that looks<br/>2 like this document?<br/>3 A. Yes.<br/>4 Q. And does that document also have a<br/>5 number at the bottom?<br/>6 A. Yes, it does.<br/>7 Q. What -- what is the number on that one?<br/>8 A. The particular one I'm looking at has a<br/>9 95000066.<br/>10 Q. And -- and your -- what you're telling<br/>11 us is you believe that number is created because<br/>12 it's just part of a numbering system within your<br/>13 company?<br/>14 A. Correct. The company at the time it<br/>15 was created, yes.<br/>16 Q. Okay. And what was the company at the<br/>17 time this document was created?<br/>18 A. Most likely FASCO Controls.<br/>19 Q. Is it more probable than not that it's<br/>20 FASCO Controls?<br/>21 A. Yes.<br/>22 Q. That resolves that issue.<br/>23 All right. So can you tell me when was<br/>24 this graph -- Exhibit 204 -- go to 205. Okay. Do<br/>25 you have 205 in your hand right now, Exhibit 205?</p> |
| <p>26</p> <p>1 Q. Okay. Where -- where did it come<br/>2 from -- where did it come from?<br/>3 A. It is -- it is our numbering -- FAS<br/>4 Controls' or previous company's numbering system<br/>5 for marking documents.<br/>6 Q. Why were those -- why were -- why is --<br/>7 do you know the reason why they use that numbering<br/>8 system?<br/>9 A. Yes. They -- we have a numbering<br/>10 system for all our documents or for all these type<br/>11 documents.<br/>12 Q. And when you say all of these type<br/>13 documents, what do you --<br/>14 A. In this case it would probably be --<br/>15 have been considered a form.<br/>16 Q. Form?<br/>17 A. What we would call a form, yeah, form<br/>18 or a graph.<br/>19 Q. So do you believe that there's another<br/>20 document called 96000025?<br/>21 A. I can check. I don't show record of<br/>22 that as relating to a circuit breaker. I -- it's<br/>23 possible that there could have been a 0025, but<br/>24 it's not related to a circuit breaker document.<br/>25 Q. Okay. Do you have another -- in your</p>                             | <p>28</p> <p>1 A. Yes.<br/>2 Q. And can you tell me as to Exhibit 205<br/>3 when was that graph created?<br/>4 A. It probably was created around the 1996<br/>5 time frame.<br/>6 Q. Can you give us a month when that was<br/>7 created?<br/>8 A. No, I cannot.<br/>9 Q. Can you tell me with certainty that it<br/>10 was created in 1996?<br/>11 A. No, I cannot.<br/>12 Q. Could it have been created before 1996?<br/>13 A. In various other forms that's likely,<br/>14 yes.<br/>15 Q. Can you tell me how -- how long FASCO<br/>16 or how long have these 40 amp breakers that are<br/>17 represented in this FASCO Controls chart, how long<br/>18 have they been made by FASCO Controls; do you know?<br/>19 A. I do not, sir.<br/>20 Q. Do you know who created this graph --<br/>21 A. No, I do not.<br/>22 Q. -- Exhibit Number 205?<br/>23 A. No, I do not.<br/>24 Q. Do you know who created the graph<br/>25 Exhibit Number 204?</p>                                                           |



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| <p>29</p> <p>1 A. No, I do not. In my eyes they're the<br/>2 same graph, but no, I do not.<br/>3 Q. And earlier you testified that the<br/>4 difference between the two is the language that's<br/>5 handwritten in, correct?<br/>6 A. Correct. Correct.<br/>7 Q. And you didn't write that language in<br/>8 there, correct?<br/>9 A. I do not know. It looks like my<br/>10 handwriting, but I do not know.<br/>11 Q. Okay. You do not know who wrote the<br/>12 language onto that chart?<br/>13 A. Correct.<br/>14 Q. Do you know who collected the data<br/>15 for -- that created this chart?<br/>16 A. No, I do not.<br/>17 Q. Do you know how many circuit breakers<br/>18 were -- were tested to create this chart?<br/>19 A. I believe that typically when we did<br/>20 these type of rerating curves it was groups of<br/>21 parts between 50 and 30 pieces typically.<br/>22 Q. And do you know -- do you have the data<br/>23 for -- do you have the data that was collected that<br/>24 created this chart?<br/>25 A. No, I do not.</p>                                                                                                                                                   | <p>31</p> <p>1 data, and then that data was given to a development<br/>2 engineer or circuit breaker engineer, and then in<br/>3 this case he most likely gave the data set to a CAD<br/>4 technician who printed the graph.<br/>5 Q. So do you know what the -- was there a<br/>6 written protocol for collecting the data?<br/>7 A. In this case I'm not aware of one.<br/>8 Q. And when they -- when the -- I'm going<br/>9 to make sort of an assumption here, but when -- as<br/>10 the data is collected, you're -- you're somehow<br/>11 tripping the breaker; is that correct?<br/>12 A. That is correct.<br/>13 Q. The procedure for tripping that -- for<br/>14 doing the trip of the breaker, do you know what<br/>15 that procedure is?<br/>16 A. I'm somewhat familiar with that, yes.<br/>17 The breakers would be in a temperature chamber<br/>18 where you can control the temperature, and they<br/>19 would be subjected to a controlled amount -- a<br/>20 measured amount of current, and the breaker would<br/>21 be monitored with equipment to know when the<br/>22 breaker had tripped and then the temperature at<br/>23 which the breaker tripped would have been recorded.<br/>24 Q. When that temperature is recorded is<br/>25 the temperature -- first off, is it a temperature</p> |
| <p>30</p> <p>1 Q. Do you know what happened to that data?<br/>2 A. No, I do not.<br/>3 Q. Do you know when the data was collected<br/>4 to create this chart?<br/>5 A. No, I do not.<br/>6 Q. If -- do you think the data that -- do<br/>7 you think the data that is -- the data that is in<br/>8 the chart is accurately -- excuse me -- do you<br/>9 think the data that was collected is accurately<br/>10 reflected in the chart?<br/>11 A. That would be a fair assumption, I<br/>12 believe, yes.<br/>13 Q. And how do you know that the data is<br/>14 accurate -- accurately reflected in the chart?<br/>15 A. Technically I do not.<br/>16 Q. All right. So, when the data is<br/>17 collected for this -- to create these types of<br/>18 charts, can you tell me how the data is collected?<br/>19 A. I'll describe that again. I can only<br/>20 speak is typically it was done as I wasn't directly<br/>21 responsible for but I was working in the same lab<br/>22 that did this type of testing. So in the<br/>23 declaration it kind of describes that typically<br/>24 parts we manufacture were given to test technicians<br/>25 who ran the tests on the parts and collected the</p> | <p>32</p> <p>1 thermometer or gauge? What is it that -- that<br/>2 records the temperature?<br/>3 A. I can speculate that it was most likely<br/>4 a thermistor, but I don't know that for sure.<br/>5 Typically these tests were done with a thermistor<br/>6 that controlled -- that measured the temperature<br/>7 inside the chamber was the standard practice, and I<br/>8 had seen that type test done on other similar<br/>9 tests.<br/>10 Q. What -- what is a thermistor?<br/>11 A. It's a -- it's a small wire that you<br/>12 put in the oven that measures temperature, and it's<br/>13 plugged into a handheld temperature digital<br/>14 readout.<br/>15 Q. Okay. And then --<br/>16 A. A thermocouple -- thermocouple -- not<br/>17 thermistor. I misspoke.<br/>18 Q. Okay. We'll go over it again. So it's<br/>19 a thermocoupler (sic)?<br/>20 A. A thermocouple.<br/>21 Q. So the thermocouple -- is the<br/>22 thermocouple attached to the breaker?<br/>23 A. Typically not. Typically it's inside<br/>24 the -- the chamber where the breaker is. The<br/>25 breaker is also inside the chamber.</p>                                                                                                                                                                                         |



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33

1 Q. Okay. So that's typically, but is --  
 2 are there times when the thermometer -- the  
 3 thermocoupler is attached to a breaker?  
 4 A. For this particular test, I don't  
 5 believe so.  
 6 Q. But in other tests are there times --  
 7 when you're testing breakers, do you sometimes  
 8 attach the thermocoupler to the breaker?  
 9 A. I've seen that done in the past, yes,  
 10 for unrelated tests.  
 11 Q. Okay. So is it possible that -- when  
 12 this testing was done to create this chart, is it  
 13 possible that the thermocoupler was attached to the  
 14 breaker?  
 15 A. I don't know.  
 16 Q. Why do you think that the thermocoupler  
 17 was not attached in this case?  
 18 A. Because it was measuring the  
 19 temperature of the chamber, and it wouldn't be  
 20 terribly relevant to be attached to the breaker.  
 21 Q. Okay. All right. So now as to the --  
 22 the -- as to the data that is represented by this  
 23 chart -- is the data that would have been -- that  
 24 would have represented this chart, if it still  
 25 existed, would it have been particularly a large

34

1 amount of data?  
 2 A. It depends on how you define large  
 3 amount, but no, not really. You would probably  
 4 have the 15 different pieces and a -- let's see  
 5 here. There's 14 -- 14 or so current settings and  
 6 maybe 14 or so temperature settings. So not  
 7 necessarily large. Several hundred data points  
 8 maybe.  
 9 Q. Okay. And then -- oh, have you ever  
 10 been involved in litigation before?  
 11 MR. GULBRANDSEN: Objection. That's  
 12 not -- beyond the scope of this deposition.  
 13 Irrelevant.  
 14 BY MR. SMITH:  
 15 Q. Go ahead and answer.  
 16 A. No.  
 17 Q. Has a customer -- has Harley-Davidson  
 18 ever asked you for the data that supports a graph  
 19 like this?  
 20 A. Yes, they have.  
 21 Q. Have you provided that information to  
 22 them?  
 23 A. Yes, I have.  
 24 Q. Would the -- the materials that are  
 25 relating to -- or the data that relates to this

35

1 chart -- excuse me. Strike that.  
 2 The data that you've given to  
 3 Harley-Davidson before for a chart like this, was  
 4 it -- the data -- was that data more than a few  
 5 pages worth of data or -- or -- can you tell me the  
 6 size of the data that you've given to  
 7 Harley-Davidson before that relates to charts that  
 8 look like this?  
 9 A. Yeah, and I would like to clarify. I  
 10 have given -- provided Harley in the past copies of  
 11 graphs similar to these, not actual data.  
 12 Q. But you could provide data to Harley --  
 13 Harley-Davidson if they asked you for it, correct?  
 14 A. Most likely, yeah. It's not general  
 15 practice, but yeah, most likely we would have been  
 16 willing to share that.  
 17 Q. Okay. And is there any reason that you  
 18 can think of why the data that relates to this  
 19 chart or any other chart wouldn't be able to be  
 20 looked at easily by Harley-Davidson --  
 21 Harley-Davidson?  
 22 MR. GULBRANDSEN: Object to form. Can  
 23 you rephrase that?  
 24 MR. SMITH: Sure, I'll rephrase it.  
 25 MR. GULBRANDSEN: You lost me on that

36

1 one.  
 2 BY MR. SMITH:  
 3 Q. Can Harley-Davidson -- if  
 4 Harley-Davidson requested the data that supports  
 5 charts like this, could they be easily reviewed by  
 6 Harley-Davidson?  
 7 A. I'm not sure.  
 8 MR. GULBRANDSEN: That calls for  
 9 speculation.  
 10 BY MR. SMITH:  
 11 Q. Well, if you were to provide the data  
 12 that goes along with a chart such as this, could  
 13 you tell me what that data might look like?  
 14 A. Again --  
 15 MR. GULBRANDSEN: Objection, asked and  
 16 answered.  
 17 BY MR. SMITH:  
 18 Q. Go ahead.  
 19 A. We -- we don't typically provide the  
 20 data. We provide the graphs that represent the  
 21 data.  
 22 Q. That's fine, but the -- but if you did  
 23 provide the data, would it be provided to  
 24 Harley-Davidson as a spreadsheet?  
 25 MR. GULBRANDSEN: Objection, assumes



|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
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| <p>37</p> <p>1 facts not in evidence.<br/>                 2 BY MR. SMITH:<br/>                 3 Q. Go ahead and answer.<br/>                 4 A. It could be, but it could also be in<br/>                 5 other forms, yes.<br/>                 6 Q. Would that be easily reviewed by<br/>                 7 Harley-Davidson?<br/>                 8 MR. GULBRANDSEN: Objection, assumes<br/>                 9 facts not in evidence and calls for speculation.<br/>                 10 BY MR. SMITH:<br/>                 11 Q. I guess I can ask it to you<br/>                 12 differently. Is there any -- any of the<br/>                 13 information that you would provide that supports<br/>                 14 the chart such as this -- is any of the information<br/>                 15 that would be used to support a chart such as this<br/>                 16 difficult to read?<br/>                 17 MR. GULBRANDSEN: Objection, assumes<br/>                 18 facts not in evidence.<br/>                 19 BY MR. SMITH:<br/>                 20 Q. Go ahead.<br/>                 21 A. The graph is the easy form to read the<br/>                 22 data. Nobody would look at the data. Customers<br/>                 23 would always -- would typically look at the graphs.<br/>                 24 Q. Is the data somehow difficult to<br/>                 25 understand or -- or encrypted in some way?</p>                                          | <p>39</p> <p>1 You had stated earlier in the deposition that this<br/>                 2 is a document that you -- that customers would<br/>                 3 reasonably rely upon to -- I don't know what -- I<br/>                 4 mean, you testified earlier that it's a -- that the<br/>                 5 chart is something that would be reasonably relied<br/>                 6 upon by a customer; is that correct?<br/>                 7 A. I don't recall. That sounds -- yeah, I<br/>                 8 mean, that sounds -- that sounds plausible.<br/>                 9 Q. Okay. Now, can you tell me if any<br/>                 10 other customers of FASCO have used or -- has any<br/>                 11 other customers that you know of, have they used<br/>                 12 this graph, Exhibit 204 and Exhibit 205?<br/>                 13 A. I can't say that they've used the<br/>                 14 specific exhibits, but I can say that they've used<br/>                 15 other similar rerating curves for other similar<br/>                 16 breakers.<br/>                 17 Q. All right. Can you tell me the names<br/>                 18 of the people or the customers that have done that?<br/>                 19 MR. GULBRANDSEN: I'm going to object,<br/>                 20 and even though I'm not your counsel, you don't<br/>                 21 have to give out customer information in this<br/>                 22 deposition.<br/>                 23 A. Yeah, I'd prefer not to say.<br/>                 24 Q. How do you know that other customers<br/>                 25 have relied on the graph?</p> |
| <p>38</p> <p>1 A. It's -- you know, it's just a bunch of<br/>                 2 numbers on a page or a spreadsheet. So the graph<br/>                 3 is what's more important.<br/>                 4 Q. Okay. And now based on everything that<br/>                 5 you've looked at today, can you tell me whether or<br/>                 6 not -- well, first off, can you tell me is the<br/>                 7 chart that you -- that is under Exhibit 504 and<br/>                 8 505 --<br/>                 9 MR. GULBRANDSEN: 204 and 205.<br/>                 10 BY MR. SMITH:<br/>                 11 Q. Exhibit Number 204 and 205, are<br/>                 12 those -- are those -- hold on for one second.<br/>                 13 Okay. Now, as to Exhibit 204 and 205, do you<br/>                 14 believe that that -- those -- those charts are<br/>                 15 accurate summaries of the -- of the data that<br/>                 16 supports them?<br/>                 17 A. To the best of my knowledge, yes.<br/>                 18 Q. And you're saying that even though you<br/>                 19 don't have the data in front of you; is that<br/>                 20 correct?<br/>                 21 A. Correct.<br/>                 22 (Off-the-record conference.)<br/>                 23 BY MR. SMITH:<br/>                 24 Q. All right. Now, let me ask you<br/>                 25 something else that I think might help us here.</p> | <p>40</p> <p>1 A. Well, I know they've requested it, and<br/>                 2 I know that we have sent it to other customers.<br/>                 3 Q. What do they rely on in the graph?<br/>                 4 MR. GULBRANDSEN: Objection, calls for<br/>                 5 speculation.<br/>                 6 BY MR. SMITH:<br/>                 7 Q. Go ahead and answer.<br/>                 8 A. Could you repeat the question?<br/>                 9 Q. How do you -- what do your customers<br/>                 10 rely on in the graph?<br/>                 11 MR. GULBRANDSEN: Same objection.<br/>                 12 BY MR. SMITH:<br/>                 13 Q. Go ahead.<br/>                 14 A. Typically -- typically they want to<br/>                 15 understand how temperature affects when circuit<br/>                 16 breakers trip.<br/>                 17 Q. Have -- have other customers ever asked<br/>                 18 you for the data that -- that supports the rerating<br/>                 19 curves and charts that you create?<br/>                 20 A. Not me personally, no.<br/>                 21 Q. You said that customers would do their<br/>                 22 own application testing, correct?<br/>                 23 A. That would be speculation on my part,<br/>                 24 but I think in general that's probably true in some<br/>                 25 cases.</p>                                                                                                                                                                                                                                |



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41

1 Q. So are you saying that you have  
 2 controlled environment data but the real world use  
 3 might differ from the controlled environmental  
 4 results?  
 5 A. Yes, that's possible.  
 6 MR. GULBRANDSEN: Objection to the  
 7 extent it misstates --  
 8 MR. SMITH: I'm sorry, Lars. You guys  
 9 were talking over each other, so --  
 10 MR. GULBRANDSEN: I'm sorry. I'll  
 11 restate my objection. I objected to the extent it  
 12 misstates prior testimony.  
 13 BY MR. SMITH:  
 14 Q. Go ahead and answer.  
 15 A. What was the question?  
 16 Q. Are you saying that you would have  
 17 controlled -- that you have controlled  
 18 environmental data but the real world use might  
 19 differ from the controlled environmental results?  
 20 MR. GULBRANDSEN: Same objection.  
 21 A. Yes, that's possible.  
 22 Q. Now, let me ask you a different  
 23 question. If your -- if Harley-Davidson came to  
 24 you and said I need all the data that backs up the  
 25 FASCO Controls chart, Exhibit 204 and 205, if they

42

1 came to you and asked you for that data, would you  
 2 be able to produce it?  
 3 A. Today?  
 4 Q. Yes.  
 5 A. No.  
 6 Q. And -- and if any other customer came  
 7 to you and said I need the data that backs up this  
 8 FASCO Controls rerating curve, Exhibit 204 and 205,  
 9 would they -- would you be able to produce that  
 10 data for them?  
 11 A. The original data, no. We could -- if  
 12 there was a business case that warranted it, we  
 13 could, you know, test current breakers to see if  
 14 they perform similarly.  
 15 Q. And then how long would that take?  
 16 A. I don't know. It depends on the  
 17 circumstance, yeah.  
 18 Q. Well, in the circumstance of the FASCO  
 19 rerating curve, Exhibit 204 and 205, how long would  
 20 it take to create that chart based on all the facts  
 21 you've given us here today?  
 22 A. It depends on the resources available  
 23 to do the testing, so the technician, the  
 24 equipment, the logistics.  
 25 Q. But you've done these kind of charts

43

1 before, correct?  
 2 A. In the past, yes.  
 3 Q. Okay. So when you did these kind of  
 4 charts in the past, how long did it take to make  
 5 them?  
 6 A. Probably a couple days' time.  
 7 Q. It would take you a couple days to  
 8 create a chart like this. And by the way, would it  
 9 be fair to say -- a fair request for a customer to  
 10 come to you and say I'd like to have all the data  
 11 that supports this chart?  
 12 MR. GULBRANDSEN: Objection, calls for  
 13 this speculation.  
 14 BY MR. SMITH:  
 15 Q. Go ahead and answer.  
 16 A. It would be an unusual request that  
 17 we -- I don't -- I can't envision a customer  
 18 wanting specific data. These are -- these are  
 19 general guideline rerating curves, and the  
 20 information can be seen from the charts themselves,  
 21 so the underlying data is typically not requested.  
 22 Q. Okay. I understand it's typically not  
 23 requested. Has it ever been requested before by a  
 24 customer?  
 25 A. I'm not aware of it, no.

44

1 MR. SMITH: I'm sorry. You guys were  
 2 talking over each other.  
 3 MR. GULBRANDSEN: All right. I made an  
 4 objection to asked and answered. You have -- it's  
 5 2:57 right now. We told this guy it would only  
 6 take an hour.  
 7 MR. SMITH: I know. I'm with you.  
 8 We're just about done here.  
 9 MR. GULBRANDSEN: Are you?  
 10 MR. SMITH: Do you need to ask some  
 11 follow-up questions, Lars?  
 12 MR. GULBRANDSEN: I don't know.  
 13 MR. SMITH: I'm not done. I just want  
 14 to ask the question.  
 15 MR. GULBRANDSEN: Well, I mean, if I  
 16 did, you know, it's -- we're pretty much over here  
 17 so --  
 18 BY MR. SMITH:  
 19 Q. Let me ask -- I'm going to ask  
 20 another -- one more question, Mr. Spangler. Can  
 21 you tell me what you reviewed in preparation for  
 22 the deposition today?  
 23 A. The declaration and I previously  
 24 reviewed the chart.  
 25 Q. Did you speak with the lawyers of --



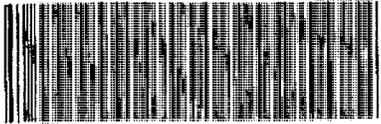
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| <p>45</p> <p>1 with Harley-Davidson's lawyers?<br/>                 2 A. I spoke with Lars a time or two.<br/>                 3 Q. Other than Lars did you speak to anyone<br/>                 4 else?<br/>                 5 A. No, I did not.<br/>                 6 MR. GULBRANDSEN: Okay. That's more<br/>                 7 than one question. Are we done?<br/>                 8 MR. SMITH: Hold on. I think I've got<br/>                 9 it all. I've got a checklist here. I'm just<br/>                 10 double-checking it.<br/>                 11 MR. GULBRANDSEN: You have two minutes.<br/>                 12 MR. SMITH: It's our only time to do<br/>                 13 this, so --<br/>                 14 BY MR. SMITH:<br/>                 15 Q. The 40 amp breakers that were tested in<br/>                 16 the -- can you tell me if the 40 amp breaker that<br/>                 17 was tested in the -- that created the FASCO -- this<br/>                 18 FASCO Exhibit 204 and 205, was the -- the 40 amp<br/>                 19 breaker in that -- that created this chart the same<br/>                 20 breaker that was -- was used in the -- in our case,<br/>                 21 the Moore V. Harley-Davidson?<br/>                 22 A. I do not know that.<br/>                 23 MR. GULBRANDSEN: Objection to<br/>                 24 foundation.<br/>                 25 MR. SMITH: I'm sorry. You spoke over</p> | <p>47</p> <p>1 INDEX<br/>                 2 Page Line<br/>                 3<br/>                 4 EXAMINATION BY MR. GULBRANDSEN 3 12<br/>                 5 EXAMINATION BY MR. SMITH 16 23<br/>                 6 SIGNATURE OF DEPONENT 48 1<br/>                 7 CERTIFICATE OF REPORTER 49 1<br/>                 8<br/>                 9 EXHIBITS<br/>                 10 Page Line<br/>                 11 SPANGLER EXH. 204, DECLARATION 5 11<br/>                 12 OF GREG SPANGLER WITH EXHIBIT<br/>                 13 A<br/>                 14 SPANGLER EXH. 205, DOCUMENT 24 7<br/>                 15 TITLED FASCO CONTROLS CIRCUIT<br/>                 16 BREAKER RERATING CURVE SNAP<br/>                 17 CIRCUIT BREAKER TYPE I --<br/>                 18 1711-40A<br/>                 19<br/>                 20<br/>                 21<br/>                 22<br/>                 23<br/>                 24<br/>                 25</p> |
| <p>46</p> <p>1 each other. You objected to foundation. That's<br/>                 2 fine.<br/>                 3 BY MR. SMITH:<br/>                 4 Q. Go ahead and answer the question.<br/>                 5 A. I don't know.<br/>                 6 MR. SMITH: I think that's it. That's<br/>                 7 all we've got, Lars.<br/>                 8 MR. GULBRANDSEN: Okay. It's 3.<br/>                 9 Thanks -- thanks, Mr. Spangler.<br/>                 10 (The deposition was concluded at 3:59<br/>                 11 p.m.)<br/>                 12<br/>                 13<br/>                 14<br/>                 15<br/>                 16<br/>                 17<br/>                 18<br/>                 19<br/>                 20<br/>                 21<br/>                 22<br/>                 23<br/>                 24<br/>                 25</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p>48</p> <p>1 SIGNATURE OF DEPONENT<br/>                 2<br/>                 3 I, the undersigned, GREGORY J.<br/>                 4 SPANGLER, do hereby certify that I have read the<br/>                 5 foregoing deposition and find it to be a true and<br/>                 6 accurate transcription of my testimony, with the<br/>                 7 following corrections, if any:<br/>                 8<br/>                 9 PAGE LINE CHANGE REASON<br/>                 10<br/>                 11<br/>                 12<br/>                 13<br/>                 14<br/>                 15<br/>                 16<br/>                 17<br/>                 18<br/>                 19<br/>                 20<br/>                 21<br/>                 22<br/>                 23<br/>                 24<br/>                 25</p> <p style="text-align: right;">_____<br/>                 GREGORY J. SPANGLER Date</p>           |



|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |  |
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| <p>49</p> <p>1 CERTIFICATE OF REPORTER<br/>2<br/>3 I, Cindy A. Hayden, Registered<br/>4 Professional Reporter and Notary Public for the<br/>5 State of North Carolina at Large, do hereby certify<br/>6 that the foregoing transcript is a true, accurate,<br/>7 and complete record.<br/>8 I further certify that I am neither<br/>9 related to nor counsel for any party to the cause<br/>10 pending or interested in the events thereof.<br/>11 Witness my hand, this 9th day of April,<br/>12 2009 at Cabarrus County, North Carolina.<br/>13<br/>14<br/>15<br/>16<br/>17<br/>18 Cindy A. Hayden, RMR, CRR<br/>19 Notary Public # 20020910053<br/>20<br/>21<br/>22<br/>23<br/>24<br/>25</p> |  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |  |



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07-2-07358-8 32025840 DEP 05-08-09

COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

KAREN MOORE and the ESTATE of  
JOHNNY C. MOORE,

Plaintiff,

vs.

HARLEY-DAVIDSON MOTOR COMPANY  
GROUP, INC., d/b/a HARLEY-DAVIDSON  
MOTOR COMPANY, a Wisconsin State  
Corporation; DESTINATION  
MOTORCYCLES TACOMA, LLC, d/b/a  
DESTINATION HARLEY-DAVIDSON, a  
Washington state limited liability  
company,

Defendants.

No. 07-2-07358-8

DEPOSITION OF GERARD F. SCHAEFER, P.E.

January 9, 2009

Seattle, Washington



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25EXAMINATION INDEX

| <u>EXAMINATION BY:</u> | <u>PAGE NO.</u> |
|------------------------|-----------------|
| Mr. Kircher            | 4               |

EXHIBIT INDEX

| <u>EXHIBIT NO.</u> | <u>DESCRIPTION</u>                                                        | <u>PAGE NO.</u> |
|--------------------|---------------------------------------------------------------------------|-----------------|
| Exhibit No. 69     | 15-page report to David Smith prepared by Gerard Schaefer dated 12/29/08. | 4               |
| Exhibit No. 70     | 41-page Dyer deposition review.                                           | 4               |
| Exhibit No. 71     | CD dated 1/8/09 of Photos, data, notes, and calls.                        | 4               |
| Exhibit No. 72     | 1-page forensic data form.                                                | 4               |
| Exhibit No. 73     | 1-page color photo.                                                       | 4               |

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1 BE IT REMEMBERED that on Friday,  
2 January 9, 2009, at 601 Union Street, Suite 4100,  
3 Seattle, Washington, at 8:31 a.m., before JUDY  
4 STEENBERGEN-WEBB, CCR, RPR, Notary Public in and for the  
5 State of Washington, appeared **GERARD F. SCHAEFER, P.E.**,  
6 the witness herein;

7 WHEREUPON, the following proceedings  
8 were had, to wit:

9  
10 <<<<<< >>>>>>

11  
12 (Exhibit Nos. 69 to 73 marked  
13 for identification.)

14  
15 GERARD F. SCHAEFER, P.E., having been first duly sworn  
16 by the Notary, deposed and  
17 testified as follows:

18  
19 EXAMINATION

20 BY MR. KIRCHER:

21 **Q** Please state your name for the record.

22 **A** Gerard Francis Schaefer.

23 **Q** Mr. Schaefer, I understand you've been retained as a  
24 consultant on behalf of the plaintiffs in the Moore  
25 versus Harley-Davidson matter; is that correct?

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1 **A** Yes.

2 **Q** When were you retained?

3 **A** Our firm was retained on or about July 26, 2005.

4 **Q** When were you personally engaged in this matter?

5 **A** I had discussions with Mr. Barovsky pretty early after  
6 that regarding the case. I was not heavily involved for  
7 some months after that.

8 **Q** Why don't you just describe for me what your involvement  
9 has been in this matter.

10 **A** I had discussions with Mr. Barovsky about motorcycle  
11 operation and the effect of quit while running pretty  
12 early after he became involved in the case. Some months  
13 after that, I was asked to determine how far up the road  
14 the motorcycle would go in various conditions. And then  
15 maybe six or eight months ago I was asked to consult  
16 directly with Mr. Cain and Mr. Smith regarding operator  
17 issues on the motorcycle.

18 **Q** With respect to your efforts to determine how far the  
19 motorcycle would go off the road under various  
20 conditions, what did you do in that regard?

21 **A** I used some test data regarding engine drag for  
22 Harley-Davidsons and elevation data for the road, slope  
23 data, and determined how far it would roll based on if it  
24 was say fourth gear, rolling uphill with no operator  
25 input as to clutch, or gear selection, how far it would

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1 roll free, so if it was in neutral and just rolling  
2 uphill.

3 **Q** So you did assuming engine drag, fourth gear, closed  
4 throttle and neutral?

5 **A** Well, it's in the spreadsheet so you can monkey with it  
6 all you want.

7 **Q** What spreadsheet?

8 **A** It's on that disk.

9 **Q** So there's a spreadsheet on that disk that has that  
10 information on it?

11 **A** That's correct.

12 **Q** Do you recall what the conclusion was?

13 **A** Oh, just that -- about as far as went down the road is  
14 within the realm of what's possible based on the  
15 condition.

16 **Q** And just in macroscopic terms, you didn't find any great  
17 discontinuity between the bike being able to coast far  
18 enough off the road to get where it was found?

19 **A** That's a fair statement.

20 **Q** Okay. Tell me about your educational background.

21 **A** I was graduated from the United States Naval Academy in  
22 May of 1989 with a Bachelor of Science degree in  
23 mechanical engineering with merit. I then attended Navy  
24 Nuclear Power School in Orlando, Florida, a six-month  
25 school in the theory and principals of nuclear

1       propulsion.

2               I then attended and became 90 percent complete at  
3       Navy Nuclear Prototype Training Unit, Idaho, a six-month  
4       course in the practical application of nuclear  
5       propulsion. I was subsequently medically discharged from  
6       the Navy. I began consulting in mechanical engineering  
7       with two firms in Annapolis, Analytical Engineering  
8       Services and Forensic Technologies International.

9               Since that time I've had various jobs in the  
10       forensic field, and continued with education in the field  
11       of mechanical engineering, accident reconstruction, and  
12       fire investigation.

13   **Q**   Have you gotten any degrees beyond a bachelor?

14   **A**   No.

15   **Q**   What accident reconstruction training have you taken?

16   **A**   I've taken courses from the University of Michigan  
17       Transportation Research Institute, the National -- NUTI  
18       is their acronym -- Northwestern University Traffic  
19       Institute. That was a correspondence course.

20               The Society of Automotive Engineer, various seminars  
21       in low and high speed accident reconstruction and vehicle  
22       dynamics. And I've also taken some vessel accident  
23       reconstruction courses.

24   **Q**   Have you taken any accident reconstruction courses  
25       particular to motorcycle accident reconstruction?

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1 A No, that's all been self-study.

2 Q Have you published any texts on accident reconstruction?

3 A No -- well, yes. Two.

4 Q Not papers, I mean a textbook --

5 A Oh, no.

6 Q Okay. And have you taught courses in accident  
7 reconstruction?

8 A No.

9 Q Tell know about your background in motorcycling.

10 A I started motorcycling in 1997. Since that time, I  
11 typically ride about 15,000 miles a year on the street.  
12 I race and ride about 2,000 miles a year in the dirt. I  
13 currently own nine motorcycles, including a 1979 Kawasaki  
14 400 LTD, a '99 BMW F-650, a '99 BMW R-11 RT, a '95 Ducati  
15 900SS, a 2002 KTM 520EXE, a 2006 KTM 525EXE, a 2003  
16 Yamaha TTR 125LE, a 2005 Yamaha TTRE, and a -- I know I'm  
17 missing one because there's nine.

18 I maintain all of those motorcycles -- all the  
19 service on them except changing the tires on the street  
20 bikes because I don't want to mar the tires.

21 Q Sounds like most of the bikes you have are off road?

22 A About half the bikes because there's four street bikes  
23 and five dirt bikes.

24 Q And the street bikes you have, would any of them -- I  
25 don't believe any of them would fall into the category of

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1 a heavyweight touring motorcycle like the Harley-Davidson  
2 involved in this case, true?

3 A False.

4 Q Which one do you think would count?

5 A The R11 RT, the sport tour.

6 Q Right. And differentiate sport tours from --

7 A It's somewhat lighter with better performance.

8 Q Well, that's all a matter of degree, isn't it?

9 A Well, that's what -- you're the one splitting the degree,  
10 and you're exactly right.

11 Q Okay. Do you recognize the distinction between a sport  
12 touring motorcycle and a touring motorcycle?

13 A Yes.

14 Q Would you consider any of your motorcycles to be touring  
15 motorcycles as distinct from sport touring motorcycles?

16 A No.

17 Q And your Ducati, for example, that's a sport bike?

18 A Yes.

19 Q And the 1979 Yamaha would be a cruiser?

20 A Yes.

21 Q Old-fashioned cruiser?

22 A It's a parallel twin cruiser, yeah. I guess when you say  
23 old-fashioned I consider the subject bike an  
24 old-fashioned cruiser.

25 Q Okay. Have you had any motorcycle skills training

1 courses?

2 **A** Yes, I have.

3 **Q** Which ones?

4 **A** The -- all were sponsored under the Motorcycle Safety  
5 Foundation course structure. The motorcycle rider  
6 course, which is the introduction course, and the two  
7 experienced rider courses.

8 **Q** All through MSF?

9 **A** Correct.

10 **Q** Have you taken any sport bike skills training like  
11 California Super Bike School?

12 **A** No, I have not.

13 **Q** Have you had any formal training in motorcycle dynamics?

14 **A** No.

15 **Q** Did you consider yourself an expert in motorcycle  
16 dynamics?

17 **A** Yes.

18 **Q** Based upon?

19 **A** My self-study.

20 **Q** And self-study being what?

21 **A** Reading texts on the subject.

22 **Q** About whom?

23 **A** You know, I can't think of the author. The title of the  
24 most in-depth one is Motorcycle Dynamics, and it's  
25 basically like a calculational-based book. Took me --

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1 for someone who reads a great deal, it took me a long  
2 time to get through that book because I read through  
3 every equation.

4 **Q** Tony Foale?

5 **A** I told you, I don't recall.

6 **Q** Cossalter? C-O-S-S-A-L-T-E-R.

7 **A** I think Cossalter.

8 **Q** From Italy?

9 **A** That sounds right.

10 **Q** How long have you worked at MDE?

11 **A** Since January 1st, 1995.

12 **Q** You are a shareholder?

13 **A** Yes.

14 **Q** Do you know where you rate one to eight in the  
15 shareholders in terms --

16 **A** Three.

17 **Q** Third most shares?

18 **A** Yes.

19 **Q** Okay, gotcha. Do you have any particular expertise in  
20 psychology?

21 **A** No.

22 **Q** Human factors?

23 **A** No.

24 **Q** Have you received any particular training in the  
25 interpretation of witness testimony or declarations?

1 **A** When you say particular, it's included in accident  
2 reconstruction training, the interpretation of  
3 information from vehicles, roadway and personnel. So as  
4 part of that training, yes, but no specific course on  
5 that subject matter.

6 **Q** Have you performed a reconstruction of this accident?

7 **A** No. Well, actually to some extent, yes, because the  
8 analysis of distance and speed based on -- and how far if  
9 they go off the road is technically a reconstruction, so  
10 yes.

11 **Q** Wouldn't you agree that to reconstruct an accident in the  
12 classical sense depends upon the existence of physical  
13 evidence of the vehicle leaving marks on the roadway, on  
14 barriers, for example?

15 **A** Yes.

16 **Q** And we don't have any of that really measured well in  
17 this case, do we?

18 **A** We don't have it measured well, no, but it exists.

19 **Q** In photographic form?

20 **A** That's correct. And the damage to the bike exists in  
21 physical form.

22 **Q** I noted in your report, which we have marked as  
23 Exhibit 69, that one of the things that you have done in  
24 this case is that you inspected the motorcycle?

25 **A** That's correct.

- 1 Q When was that?
- 2 A When it was in our shop.
- 3 Q When was it in your shop?
- 4 A It would have been a couple of years ago, back in 2004 or
- 5 '05.
- 6 Q Was that when Mr. Hejlik from Harley-Davidson was
- 7 present?
- 8 A I didn't inspect it as part of a joint inspection with
- 9 anyone except MDE personnel.
- 10 Q What did you do?
- 11 A We just looked over the motorcycle that's got the damage.
- 12 Q Do you recall if there was damage on the right side of
- 13 the motorcycle?
- 14 A I recall that there is not damage on the right side of
- 15 the motorcycle.
- 16 Q No evidence of falling on the right side at all?
- 17 A I don't recall any.
- 18 Q Have you documented that?
- 19 A No, I didn't photograph the motorcycle.
- 20 Q Did you take notes of your inspection?
- 21 A No.
- 22 Q So there's no record of it photographically or in text in
- 23 any form?
- 24 A That's correct.
- 25 Q Have you relied upon the results of that inspection in

1 any particular manner for the opinions expressed in your  
2 report?

3 **A** Yes.

4 **Q** Which?

5 **A** Some of the witnesses, particularly the Risticks, opined  
6 or recalled that the motorcycle was on its side on the  
7 roadway, not leaning against the guardrail after the  
8 accident. I discount that testimony.

9 **Q** Why?

10 **A** Because there's no damage to the right side of the  
11 motorcycle. There's no damage to left side that would  
12 indicate that it was lying on the roadway. Rather it was  
13 up against the guardrail as shown in the photographs.

14 **Q** Would you agree that Louis and Linda Ristick are the only  
15 witnesses to have a complete perspective on the  
16 occurrence of the accident from the beginning of  
17 Mr. Moore changing lanes through the point where the  
18 Moores were ejected from the motorcycle until the point  
19 where the motorcycle came to rest?

20 **A** I think the Wallas didn't see it come to a rest.

21 **Q** Correct, they drove further up the hill and came back --

22 **A** Right. They passed it during the time it was against the  
23 guardrail, so I think you're right, that the Risticks are  
24 the ones who had the longest view of the accident.

25 **Q** And likewise, the Olsons drove downhill past the accident

1 scene, so to speak, and stopped and walked back up?

2 **A** Right.

3 **Q** You have seen photographs from the Oregon State Patrol of  
4 an individual in a sleeveless tee shirt with tattoos  
5 positioning the motorcycle and holding it up in near the  
6 guardrail?

7 **A** Yes.

8 **Q** And you have read the testimony of Louis Ristick  
9 indicating that the motorcycle had been moved to that  
10 location from its point of rest, according to  
11 Mr. Ristick, it was further up the hill?

12 **MR. SMITH:** I'm sorry; object to the  
13 form of the question.

14 **Q** (By Mr. Kircher) Do you have Mr. Ristick's deposition  
15 available to you?

16 **A** No, I don't.

17 **Q** Have you read it --

18 **A** I mean I have it available to me except not here at this  
19 moment. I have read it in electronic form.

20 **Q** Just take a look at testimony on Page 112 and 113 and see  
21 if that refreshes your recollection about his testimony  
22 concerning the individual with the tattoos and the  
23 sleeveless shirt.

24 **A** (Witness complies.)

25 Okay.