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STATE OF WASHINGTON

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THE COURT OF APPEALS, DIVISION II

State of Washington

**KAREN MOORE AND THE ESTATE OF
JOHNNY C. MOORE**

PLAINTIFFS

v.

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

DEFENDANTS

APPELLANT'S REPLY BRIEF

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CIVIL

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This appeal is not about proximate cause questions.

As this reply brief is being written, the nation is abuzz over allegations that venerable Toyota Motor Corp. may have actively covered up evidence of problems with unexpected acceleration. See Exhibit A.

One would have to be incredibly naive to believe, with millions and millions of dollars at stake, that some large corporations would not hesitate to deflect problems even with “smoke and mirrors” if necessary. A case in point is Harley’s response brief.

From page 9 through 13, there is extensive discussion about the testimony by Dr. Karen Gunson. This entire discussion is intended to persuade the court that the **cause** of Mr. Moore’s death was medical, rather than mechanical. Indeed, Harley concludes its brief with this comment: “But this accident was not due to any defective part nor any negligence on the part of Harley-Davidson.”

Causation is naturally a substantial issue in this case. The general facts about what happened are not disputed, but there has always been a question about whether Mr. Moore’s untimely death was due a cardiac event, plain rider error or an unexpected shut-down and restart. Harley argued about causation throughout the trial.

However, the jury never reached the question of proximate cause. The jury never reached that issue because it stopped

deliberating when it concluded the recalled motorcycle was not defective. The jury never reached Question No. 2 on causation.¹

What then is the point of Harley's extensively quoting Dr. Gunson's testimony? Ms. Moore might point out that Dr. Gunson testified cardiac arrest could be conclusively ruled out because of bleeding at the places where Mr. Moore fractured bones on impact.² However, what would be the reason to spend the court's time on that? The jury did not reach this question and all counsel are aware it's not the job of this court to weigh conflicting evidence. Accordingly, the **only** point of Harley's arguing on appeal about **causation** is to confuse, distract, and mis-direct the court.

Harley's statistical evidence is irrelevant and designed only to confuse the court as it confused the jury.

Harley-Davidson indicates that only ½ of 1% of the recalled motorcycles ever failed. See e.g. page 2, first full paragraph. Without quibbling over the accuracy of that statistic, what exactly is the point?

First of all, we know that about 88,000 motorcycles were recalled. If ½ of 1% fail – experience a quit-while-riding event – then about 440 motorcycles failed. The fact that only ½ of 1% fail tells us zero about whether the Moore motorcycle is one of the 440 that failed.

¹ The jury verdict is appended to the Notice of Appeal and is the subject of a supplemental designation.

² See page 13, line 14 to page 19, line 16 of Dr. Karen Gunson's deposition which is attached as an Appendix to Harley-Davidson's brief.

Harley's argument is apparently: out of 88,000 motorcycles recalled, not many fail, **therefore** it's unlikely the Moore motorcycle failed. This, of course, is completely illogical because the fact that only a small number fail says nothing about whether the Moore motorcycle failed. This is another one of the arguments Harley used to unfairly confuse the jury.³

More importantly, because the jury never reached the question of whether the Moore motorcycle failed on the day Johnny Moore died – that is, never reached the causation question – statistical evidence about percentages of motorcycles that fail is irrelevant, and also presented now only to confuse and mis-direct the court.

Mr. McGowan's testimony about wiring issues, bad "crimping," loose nuts and the like is simply a diversion, and fundamentally irrelevant.

Harley-Davidson also discusses in detail the testimony of Mr. McGowan as set out on page 8-9 of their brief. He was indeed asked what caused "the circuit breaker quit-while-running events that culminated in the 113 recall," and we agree that Mr. McGowan responded:

³ Harley's statistics themselves are misleading and logically flawed. It's well-known that the 440 motorcycles known to have experienced a problem did not do so the minute they left the dealership. Like the Toyotas that are experiencing acceleration issues, these Harley motorcycles may be driven many thousands of miles with no problem before failure. A large number of the motorcycles had breakers replaced, almost all before any real problem occurred. Virtually all of those might have eventually experienced a quit-while-running incident at some point, but for the recall. So, really, Harley's statistics show only that about 440 motorcycles failed **before** the main breaker was replaced under the recall program.

The bikes that seemed to be opening when they shouldn't, typically turned out to be a combination of engine heat and a number were found to have, in fact, loose nuts on the terminals, and we have also found some wiring issues, that is, we had - the way the wires connect to the terminals on the circuit breaker is the wires have a ring terminal crimped on the end, which is an open loop that fits over the stud on the circuit breaker and then is crimped down by the nut. We found some wires that had bad crimps and therefore generated additional resistive heating. So it's typically been a number of issues with some particular bikes that have caused unusual resistive heating at the terminals.

First of all, what “typically” happens is fundamentally irrelevant; pertinent evidence is only what actually happened on the Moore motorcycle, more probably than not.

More importantly, this all goes to causation; something the jury never addressed. Bad crimping or loose connecting or “kep” nuts could – in addition to the breaker – cause a quit-while-riding problem; for that matter, a short in the headlight wiring, or running out of gas could all cause quit-while-riding incidents, but these were ruled out by the evidence.

What the evidence did show is that Harley provided the National Highway Traffic Safety Administration (NHTSA) with an explanation for what was causing unexpected shutdowns, along with a specific recall program designed to fix the defect. The recall notice, and service bulletin indicates that to fix a recognized defect, dealers should replace the 40-amp breaker. See CP 467-68 (also Trial Exhibit 71). **Nowhere** in any of the material provided to NHTSA does Harley indicate that dealers should

ignore the breaker and look for “loose nuts on the terminals,” or “wiring issues” or “bad crimps” on wires leading to “additional resistive heating.”

And, naturally, Harley’s official service bulletins designed to appraise dealers of how to fix the defect nowhere advise that wire crimping, wiring or “loose nuts” should be inspected and fixed. *Id.*

The question in this appeal is whether the jury determination that no defect existed is supported by substantial evidence in the record. As a matter of public policy, a form of estoppel should prevent Harley from asserting that the 40-amp breaker is perfectly fine and, in fact, **not** a design defect. In short, Harley cannot fairly advise NHTSA in its official response to the federal government that the main breaker needs to be replaced, then argue to a jury that loose nuts or bad wire crimps are really the **sole** cause of problems,⁴ and that if those **other** problems are ruled out, there is nothing wrong with the Moore motorcycle’s design.

The issue here is whether a reasonable jury, on the facts of this case, could possibly find that the motorcycle was not defective when the evidence shows it has a 40-amp breaker and even Harley reports this as a design defect. Ruling out the presence of bad wire crimps, improperly tightened “kep” nuts, and the like is completely irrelevant to the question of whether delivering the motorcycle with its 40-amp breaker renders the motorcycle “defective” for purposes of product liability law.

⁴ If someone testified that loose nuts were the **sole** cause of problems, the jury finding on Question No. 1 would be supported by some evidence, but no one testified that loose crimping,

Ultimately – as reported to NHTSA – the Moore motorcycle is defective **because** of its 40-amp breaker. The motorcycle might **also** be defective if it had bad wire crimping, loose kep nuts or other things, but those **other** potential defects were ruled out by Harley’s evidence. There is, however, no genuine dispute that the 40-amp breaker is inadequate for preventing unexpected shut-downs; hence, the recall.

Testimony by Mssrs. Hejlik, Riley and Schaefer are irrelevant to issues on appeal.

At pages 13-16, Harley presents a lengthy discussion of its ride-testing and Harley’s “bake” testing of the breaker, all leading to the conclusion presented on page 16:

Based on his inspections of the motorcycle and the testing her performed, Mr. Hejlik’s opinion was that the circuit breaker did not trip on the day of the accident.

This too is fundamentally misleading. Certainly, the jury could have accepted this testimony and found the breaker did not trip that day. Or, the jury could have accepted other evidence from which one could infer that it did.

However, the jury never reached the question of whether the breaker in fact tripped the day Johnny Moore died. The jury did not reach that causation question because it stopped after answering Question No. 1

bad wiring, or loose nuts were the **sole** cause of problems; no one testified that the 40-amp breaker was **not** inadequate.

with the response that the motorcycle was not defective. Accordingly, issues of causation and damages was never reached. (It's question No. 2. to the verdict form which is appended to the Notice of Appeal and the subject of a supplemental designation of papers.)

Similarly, Mr. Riley is alleged to have concluded “that the Moores did not experience a quit-while-riding event due to tripping of the main circuit breaker.” Harley’s brief at page 16. And, Harley quotes parts of Mr. Schaefer’s testimony that indicates “Schaefer’s opinion was that even if the Moore Motorcycle quit while running, Mr. Moore should have been able to come to a safe stop rather than contacting the guardrail.” But, again these are all issues of causation – a question never reached by the jury.

Obviously, the jury could have accepted other testimony or drawn other inferences from the testimony and reached a different conclusion. However, the jury did not reach a decision on causation.

The question in this case is whether the jury decision that the Motorcycle was not defective is defensible. That isn’t answered by presenting this court with parts of the trial that address the issue of what **caused** the crash.

No substantial evidence supports the jury finding on Question No. 1.

A page 31, Harley finally addresses the core question, asserting:

Harley-Davidson offered evidence that supported a finding that the application of the 40-amp circuit breaker did not render the Moore's motorcycle defective.

This, of course, is a critical line in Harley's brief. Notice, however, that it is followed by no citation to the record. That's because no one testified that the 40-amp breaker was adequate to make the motorcycle safe; indeed, that would have been completely contrary to everything Harley told NHTSA.

Harley-Davidson offered *no* evidence that supported a finding that the application of the 40-amp circuit breaker did not render the Moore's motorcycle defective. At pages 16-18, Harley discusses the testimony of their expert Mr. Riley, indicating that: "Based on his inspections of the motorcycle and the testing her performed, Mr. Hejlik's opinion was that the circuit breader did not trip on the day of the accident." True, but that's a question of causation. Mr. Riley did *not* testify that the 40-amp breaker was adequate to make the motorcycle safe, and that would be completely contrary to what Harley told NHTSA in their recall.

Harley points out that Mr. Riley also opined that a "quit-while-running event would have no effect on the operator's ability to control and stop the motorcycle," and that he "determined that there was ample room for Mr. Moore to pull off on the right side of the road." Again, these all are issues going to causation. Mr. Riley did not testify that a motorcycle

equipped with a 40-amp breaker was safe, and that would be completely contrary to what Harley told NHTSA in their recall.

No witness testified that the motorcycle, equipped with a 40-amp breaker was **not** defective, and Harley has cited no such testimony. Moreover, in their recall, Harley asserted to NHTSA that such a design was defective and needed to be fixed – hence the recall.

On that evidence, no reasonable juror could have found against plaintiff on the defect question. Accordingly, the answer to Question No. 1 is not supported by substantial evidence and the case should thus be remanded for new trial.

The Motorcycle is defective even if only a tiny fraction of all motorcycles incorporating the 40-amp circuit breaker ever experienced a quit-while-running event.

Instead of presenting testimony about adequacy of the 40-amp breaker, Harley's asserts only that a small percentage of the breakers actually failed. But, as described above at n. 1 on page 3, the number of motorcycles experiencing a quit-while-running incident is irrelevant to the question of whether the Moore motorcycle is defective. **All** of the Toyotas that are constructed like with documented acceleration problems are defective even if only some small fraction of the cars actually experience unexpected acceleration. The only way a vehicle is not defective is if it is somehow constructed differently from those that are defective. The Moore

motorcycle is not constructed differently than all other Ultra Classics with the 40-amp breaker that were recalled.

Accordingly, no reasonable juror could conclude that the Moore motorcycle was not defective, and the jury finding on this question should be reversed as incompatible with the evidence.

Mr. Proft's conclusions do not invalidate Cline's analysis.

The issues relating to exclusion of Ms. Moore's experts and inclusion of Harley's seem to have been adequately briefed and nothing further need be added, except that at page 30, Harley-Davidson asserts that "Mr. Proft's report directly contradicts Cline's theory that somehow the marks left by the factory test are discernable from marks left by other tripping events." However, that's just inaccurate.

Mr. Proft's report indicates that, electrical arcs can fork thus resulting in multiple pit-marks from a single tripping event. Accordingly, he indicates that counting the ***number*** of pit-marks cannot lead to conclusive statements about the ***number*** of arcing events. Mr. Proft simply doesn't comment on Cline's analysis based on ***direction*** of metal spatter.

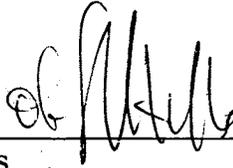
More importantly, Proft's disagreement with Cline's conclusions is not a basis to exclude the Cline testimony altogether. Rather, it simply raises issues for resolution by the jury about which expert is more credible.

CONCLUSION

This case should be remanded for a new trial because there is no substantial evidence to support the jury conclusion that the Moore motorcycle is not defective.

At the new trial, Mr. Hejlik's testimony about Harley-Davidson's "bake test" should be excluded unless there is a showing that it is relevant and his analysis meets the Frye standard. Mr. Cline's testimony should be permitted.

DATED this 7th day of April, 2010.



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EXHIBIT A



WATCH: Toyota President Denies Cover-Up

In an Interview with ABC News, U.S. Chief Jim Lentz Insists Toyota Didn't Hide Acceleration Problem

By BRIAN ROSS

Feb. 1, 2010 —

During an interview with ABC News on a Manhattan street, Toyota's U.S. president Jim Lentz denied that the international car company had hidden problems with acceleration in its vehicles, or was trying to blame sticky gas pedals for a problem that may originate in the car's electrical system instead.

WATCH THE FULL INTERVIEW TO THE LEFT

ABC News asked Lentz if it was true that Toyota had been covering up problems with runaway acceleration in its vehicles for years. Government documents show that Toyota first fielded reports of "runaway Toyotas" in March 2007.

Lentz responded by saying, "Right now, what's important is we're here to get the news out to our customers."

Asked again to answer allegations of a cover-up, Lentz stated flatly, "There is no cover-up."

"How long have you known about this problem of the runaway cars," asked ABC News, "not just the sticky gas pedals?"

"It's a lot of detail that goes into this," said Lentz. "We've been upfront. We're taking care of customers right now. What's most important is that our customers know there is a fix. They're going to be able to get their cars repaired this week."

ABC News asked Lentz if all problems with the cars had been fixed, including any electronic problems.

"I'm confident that there are no electronic problems," answered Lentz.

Lentz had been on a media blitz Monday to restore confidence in consumers, and to announce plans to fix that the company believes is causing the sudden acceleration problem.

In a release, the company said it will begin fixing accelerator pedals this week by reinforcing the pedal assembly, thereby eliminating friction that sometimes causes the sudden acceleration to occur. Lentz told NBC's Today Show that the reinforcement parts have been shipped today and that dealers have been trained on how to install them. He said the company became aware of the sticky pedal problems last October and denied that the company's rapid growth hindered their ability to quickly identify and resolve the issues.

Lentz also appeared on a [video](#) posted on the company's [YouTube channel](#) Monday, saying he was "truly sorry" for concerns over the recall.

"I apologize for this situation and I hope you'll give us a chance to earn back your trust," said Lentz, adding that customers will be notified via mail on how affected models can be remedied.

Fix Too Little, Too Late, Experts Said

Yet, some safety analysts say the announcement comes too little, too late.

"They're at a point where their reputation is rapidly declining, and the credibility is rapidly declining in a way where probably no one would have expected," said safety expert Sean Kane.

In Washington, the failure of the [National Highway Traffic Safety Administration](#) (NHTSA) to spot the problem sooner is also drawing questions.

"There's no reason they could not have known about this and been further involved in pushing Toyota," said former NHTSA administrator Joan Claybrook. Claybrook is also the former president of [Public Citizen](#), a public interest advocacy group.

Documents filed with the federal government by Toyota show the company first received field reports of the sticking gas pedals more than two years ago and, by last October, saw a growing problem.

"Starting in March 2007, Toyota received field technical information regarding reports of accelerator pedals demonstrating symptoms such as rough operation or being slow to return to the idea position," a letter sent from Toyota to the NHTSA Jan. 21 says.

U.S. Transportation Secretary Ray LaHood said Wednesday that when his agency discovered the gas pedals on some models of Toyotas were sticking "we immediately told Toyota that they should recall those cars."

[CLICK HERE TO WATCH DRIVER ACCOUNTS OF RUNAWAY TOYOTAS](#)

Speaking on a Chicago radio program, LaHood said a fatal accident in September led his agency to demand a meeting with the car manufacturer.

"The truth is, the reason Toyota decided to do the recall and to stop manufacturing is because we asked them to," LaHood told WGN Radio.

NHTSA Administrator David Strickland said the agency "informed Toyota of their obligations and they complied with the law. Their decision to halt sales was legally and morally the right thing to do."

[Click Here for the Blotter Homepage.](#)

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**IN THE
COURT OF APPEALS
DISTRICT II**

KAREN MOORE AND THE ESTATE OF
JOHNNY C. MOORE

Plaintiffs

vs.

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

Defendants,

NO. 39400-6 -II

DECLARATION OF SERVICE

DECLARATION OF SERVICE

I, Janna Sutton, declare as follows:

I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

I am the Legal Assistant for the Law Offices of David Smith, PLLC.

On April 7, 2010. I caused to be served at the addresses and in the manner described a copy of the following documents:

- **Appellant's Reply Brief**

DECLARATION OF SERVICE

Page 1

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• Declaration of Service

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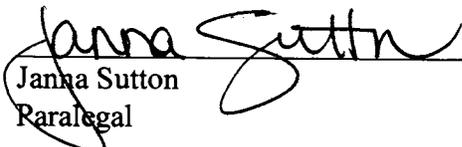
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I DECLARE under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, WA this 7th day of April 2010.



Janna Sutton
Paralegal