No. _____

In The
Supreme Court of the United States

MICHAEL ROPER,

Petitioner,

v.

KAWASAKI HEAVY INDUSTRIES, LTD., KAWASAKI MOTORS CORP., U.S.A. and MOTIONS-HONDA-KAWASAKI-SUZUKI-YAMAHA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The circuits are divided as to when the District Court may exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Some circuits will disallow an expert only if the expert's methodology is unreliable thereby allowing a jury to resolve disputes as to the expert's application of the methodology and other factual issues. Other circuits are stricter and hold that "*any* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible, whether the step completely changes a reliable methodology or merely misstates that methodology." The Question Presented therefore is:

In a civil damages case, when may a District Court exclude expert testimony as unreliable for reasons other than the expert's use of a faulty methodology or principle, especially when the decision to exclude is outcome determinative, thereby denying a Plaintiff his Right to a Trial by Jury guaranteed by the Seventh Amendment?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Michael Roper, Petitioner on Review, was the Plaintiff-Appellant below.

2. Kawasaki Heavy Industries, LTD. and Kawasaki Motors Corp. and Motions-Honda-Kawasaki-Suzuki-Yamaha were the Defendants-Appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Michael Roper respectfully Petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion was entered March 21, 2016 and is attached in Petitioner's Appendix. The District Court entered its order on June 29, 2015 and is also attached in Petitioner's Appendix.

JURISDICTION

The Eleventh Circuit entered its opinion on March 21, 2016. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND RULES

The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rule of Evidence (FRE) 702 provides: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

STATEMENT OF THE CASE

A. BACKGROUND AND STATEMENT OF FACTS

This petition arises out of a diversity action, removed to Federal Court, in which summary judgment was granted to the Respondents by the United States District Court for the Northern District of Georgia and affirmed by the U.S. Court of Appeals for the Eleventh Circuit. The basis of Petitioner's original complaint was that the voltage regulator in certain Kawasaki motorcycles would malfunction thereby causing the motorcycle to stall. Petitioner further alleged that because Kawasaki knew of this defect before Petitioner's crash, and did not warn Petitioner of the known risk, then Kawasaki would be liable under Georgia products liability law.

On February 27, 2011, Petitioner, Michael Roper, was riding a 2009 Kawasaki motorcycle, manufactured

and marketed by Respondents. The Petitioner alleges that while he was riding the motorcycle on a curvy, downhill stretch of road, the motorcycle's engine stalled, causing him to lose control and crash into an oncoming car. He suffered catastrophic orthopedic injuries incurring approximately one million dollars in medical bills as a direct and proximate result of the collision.

Following the crash, Roper told his wife, Arlene Roper, and his surgeon Dr. Daniel R. Schlatterer that the motorcycle engine had stalled, causing the crash and that the motorcycle "cut off on him and seemed to malfunction." Additionally, at least one of the eyewitnesses to the wreck reported seeing Roper looking down and struggling with his motorcycle, as if there were something going wrong with it, just prior to the crash.

Then, in February of 2012, one year after the wreck, Respondents recalled thousands of Kawasaki motorcycles, including Roper's, because of a "defect which relates to motor vehicle safety." Specifically, Kawasaki told its customers, dealers, the United States government, and to itself that in some of the motorcycles it manufactured and sold, including Roper's, "the voltage regulator can overheat, causing uncontrolled current output which can result in insufficient charging current being provided to the battery." According to Kawasaki, "[t]his can cause discharge of the battery and can lead to engine stalling. . . ." Finally, Kawasaki warned that "[e]ngine stalling while

riding can create the potential for a crash resulting in injury or death."

Kawasaki even sent a card to Roper after the "Warning and Recall Notice" reiterating these same points. Kawasaki told Canadian customers and the Canadian government that "[e]ngine stalling [because of the voltage regulator defect] would result in lost vehicle propulsion which, in conjunction with traffic and road condition, and the rider's reactions, could increase the risk of a crash involving property damage and/or personal injury."

Upon inspection after the wreck, the Roper motorcycle showed such melting, consistent with overheating during failure from the defect. The melting supports the conclusion that the regulator overheated and failed shortly before the collision because of the flow-pattern in the melted substances, which means the casing was heated to liquid form and flowed toward the ground where the bike came to rest on its left side.

The record includes expert testimony of Mr. Wayne Denham, a mechanical engineer and ASE-Certified Master Technician, who "hold[s] the opinion to a reasonable degree of scientific certainty that a manufacturing defect existed in the voltage regulator in the subject motorcycle, which defect caused Mr. Roper's motorcycle engine to stall on February 27, 2011, and directly led to the collision."

The record also includes expert testimony of Mr. Randy Nelson, an expert in motorcycle handling and

stability including the effects of engine stall, who holds the opinion that the loss of engine power increases the risk of a crash and is the probable cause of the crash that injured Mr. Roper.

Mr. Nelson has extensive experience riding motorcycles and has testified in court as an expert on motorcycle handling and stability on many occasions. Mr. Nelson performed specific testing by riding an exemplar Kawasaki Ninja ZX-10R through the scene of the Roper incident. Taking into account his extensive experience riding motorcycles and multiple occasions on which an engine has stalled while Mr. Nelson was riding, Mr. Nelson was able to use this information and specific ride-through testing to provide a basis to reach an expert opinion regarding the effects of an engine stall on the handling and stability of Mr. Roper's motorcycle on the subject roadway.

B. THE DECISIONS BELOW

1. In the district court below, the Respondents moved to exclude both of Petitioner's experts and for summary judgment, basing its summary judgment motion totally on the exclusion of the experts. *In a single order*, the trial court excluded the testimony of expert witness Wayne Denham, a mechanical engineer and ASE-Certified Master Technician, holding that he was not qualified to testify that the voltage regulator in the subject motorcycle was defective because he had not "ruled out every possibility other than the defective [voltage regulator]." Further, the trial court ruled, as a

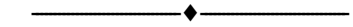
matter of law, that the testimony of Respondent's expert, Randall Nelson, should also be excluded on the basis that Nelson relied to some extent on Denham's opinion, which the trial court found to be inadmissible. Then, finally, with both of the Petitioner's experts excluded, the district court granted summary judgment. The District Court's determination to exclude the experts was, therefore, outcome determinative of the case, ending it prior to trial by jury.

2. The Eleventh Circuit U.S. Court of Appeals affirmed the district court, holding that it was appropriate for the Court, as opposed to a jury, to weigh and balance the experts' testimony. For example, the Eleventh Circuit agreed "with the district court that Denham's differential analysis was unreliable because he failed to exclude causes (other than the voltage regulator) which the evidence showed reasonably could have caused the accident." Denham's application of his methodology, the appeals court said, failed to exclude these alternative possible causes (such as excessive speed or operator error) and therefore could not be relied upon to "rule in" the voltage regulator as the cause. The Eleventh Circuit also approved findings and conclusions based on police photographs taken at the scene some 70-90 minutes after the wreck, drawing conclusions about whether a failed voltage regulator had been the proximate cause of the wreck.

3. Even a cursory reading of either the district court or the appellate court decision reveals that the determinations made, went far beyond the "gatekeeping" functions envisioned in Federal Rule of Evidence

702. Instead of determining the efficacy of a single expert's testimony by weighing it against established scientific principles and standards, the courts here "pitted" the testimony of one side's expert against the others. This analysis necessarily involved engaging in tasks typically reserved for juries, like the review and weighing of photographs from the scene against testimony of competing experts to determine who is most believable.

4. Finally, it should be noted that the source of the determinations made about the testimony were made based upon review of discovery depositions, not testimony which was subject to the type of thorough and sifting cross examination used at trial. And, that the ultimate grounds for exclusion, which became outcome determinative of the case, was that Petitioner's expert could not exclude all other possible causes of the wreck. This is a much more severe burden than any plaintiff would ever be forced to carry at trial where he would only need to prove his case by a preponderance of the evidence. In essence, what occurred in this case was that the trial judge determined which experts she believed, struck the other experts under *Daubert*, and decided this case without a jury.



REASONS FOR GRANTING THE PETITION

The Circuits are divided as to when conflicts in expert testimony should be resolved by pre-trial *Daubert*

hearings or by a jury. *Daubert* and Federal Rule of Evidence 702 are subject to widely divergent views amongst the circuits on this most important threshold issue. Allowing the District Court broad latitude to exclude testimony for an endless number of reasons violates the right to a jury trial provided by the Seventh Amendment to the United States Constitution. Application of a Federal Rule of Evidence should never be interpreted in such a manner as to deny a Constitutional right. Furthermore, the decision of the 11th Circuit is wrong in that it affirmed a District Court that went far beyond the gatekeeping requirements imposed by *Daubert*. The best interpretation of FRE 702 and *Daubert* is to allow the jury to decide most of the issues regarding the validity and credibility of an expert's testimony. Granting certiorari in this case will enable the Court to address and resolve the most important question remaining under Rule 702 after *Daubert*: The effect which overly broad exclusions of expert testimony on the right to trial by jury. *See Apple, Inc. v. Motorola, Inc.*, 2012 WL 1959560, at *1 (N.D. Ill. May 22, 2012) (Posner, J., sitting by designation) ("The biggest challenge to the judge at a *Daubert* hearing . . . is to distinguish between disabling problems with the proposed testimony, which are a ground for excluding it, and weaknesses in the testimony, which are properly resolved at the trial itself on the basis of evidence and cross-examination.") (excluding expert damages testimony), *rev'd*, 757 F.3d 1286, 1313-26 (Fed. Cir. 2014) (reversing exclusion order). The lower courts are deeply divided on this issue.

Several of the circuits require the District Court to be far more exacting in its *Daubert* analysis, thereby leading to the frequent exclusion of experts. Other circuits limit the trial court's inquiry only to the reliability of the experts "methodology" leaving challenges to the expert's application of that methodology as well as any disputes as to factual extrapolations and conclusions to be decided by a jury.

I. THE CIRCUITS ARE SPLIT AS TO WHAT STANDARDS SHOULD BE APPLIED BY THE DISTRICT COURT IN DETERMINING WHETHER TO EXCLUDE AN EXPERT WITNESS.

In addition to the Eleventh Circuit, the Second, Third, Sixth and Tenth Circuits apply far more scrutiny before admitting expert testimony, by adopting the bright line rule that "*any* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible, . . . whether the step completely changes a reliable methodology or merely misstates that methodology." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (emphasis added).

The Second Circuit in *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265-70 (2d Cir. 2002) held substantially the same thing as did *Paoli* in relying on Rule 702 and *Paoli II* to affirm the trial court order excluding expert testimony offered to show a causal link between plaintiff's exposure to workplace

toxins and his injuries because one expert "fail[ed] to apply his stated methodology reliably to the facts of the case."

In *Tamraz v. Lincoln Electric Co.*, 620 F.3d 665, 670 (6th Cir. 2010) the Sixth Circuit required a far more restrictive evaluation of the experts testimony that would have been undertaken in other circuits ruling that gaps in expert's reasoning from previously published studies meant that his testimony was "at most a working hypothesis, not admissible scientific 'knowledge'" based upon "'sufficient facts or data'" or "'the product of reliable principles and methods . . . applied reliably to the facts of the case.'"

Most importantly, the 10th Circuit in *Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009) appears to go somewhat further by citing *Paoli II* "any step" rule with approval and *specifically rejecting* the argument "that *Daubert* should not have been used to assess the *application* of the experts' methodologies, but rather should have been used to assess *only the methodologies* upon which [they] relied." (Emphasis in original). The issue that is specifically rejected in *Tyson Foods* forms the crux of the circuit split.

The Seventh, Eighth and Ninth Circuits apply far less scrutiny before admitting expert testimony, reasoning that faults in the expert's application of the appropriate methodology and other factual disputes go to the weight of the expert's opinion and not their admissibility.

In *Johnson v. Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014), the Eighth Circuit reversed the District Court decision excluding expert testimony offered to prove that contaminated infant formula caused a child's brain damage. Although the experts did not rule out the child's home environment or the municipal water supply as possible sources of the contamination, the Eighth Circuit construed *Daubert* to "call for the liberal admission of expert testimony" and held that "such considerations go to the weight to be given the testimony by the factfinder, not its admissibility." *Id.* at 560-62, 564.

Similarly, the Seventh Circuit in *Manpower Inc. v. Ins. Co. of Penn.*, 732 F.3d 796 (7th Cir. 2013) reversed trial court decisions excluding expert testimony, reasoning that challenges to the expert's assumptions were matters for cross-examination, and not issues that go to issues of reliability under FRE 702. Specifically, the Court said that "[r]eliability . . . is primarily a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusions produced." *Id.* at 806. The Court reversed a trial court order excluding expert damages testimony because the concerns that prompted exclusion implicated not the reliability of the expert's methodology, but the data from which he chose to extrapolate. *Id.* at 807-10.

In *SQM North America Corporation v. City of Pomona*, 750 F.3d 1036 (9th Cir. 2014), the City of Pomona was seeking to hold SQM liable for perchlorate in its water supply. The District Court excluded the

Plaintiff's expert and the Ninth Circuit reversed holding that "only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony."

There is simply no uniform rule on the judge/jury issue regarding the scrutinizing of expert testimony in Federal Court. The Court should grant the Petition for Writ of Certiorari in order to resolve a clear circuit split and to restore consistency as to expert testimony admissibility in the Federal Courts.

II. THE ELEVENTH CIRCUIT'S DECISION IS WRONG

A. PETITIONER'S SEVENTH AMENDMENT RIGHTS WERE VIOLATED

The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In this case, the Petitioner's Seventh Amendment rights were clearly violated. The Petitioner should have been permitted to have a jury decide the disputed issues regarding the expert.

The deprivation of the right to a trial by jury "at the hands of the English was one of the important

grievances" leading to the American Revolution. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting). The Declaration of Independence also cites the lack of trial by jury as one of the gravest injuries against free people, "having as its direct object the establishment of an absolute Tyranny over the States." *The Declaration of Independence*, 20 (U.S. 1776) ("For depriving us in many cases, of the benefits of Trial by Jury").

Although the Founders often spoke of the importance of criminal juries, they viewed civil juries with similar reverence. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 664 (1973). Alexis de Tocqueville also commented on the importance of civil jury trials in the new America: "Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free." Alexis De Tocqueville, *Democracy In America* 274 (Jacob Peter Mayer ed., 2000).

It is very clear that the Framers were most concerned about protecting personal liberties from an oppressive executive, but they were also weary of an oppressive judiciary. To be sure, quite a number of the debates at the 1787 Continental Congress involved creating government structures that minimized the potential for judicial oppression. From these debates, the civil jury emerged "as [a] necessary . . . counterbalance [to] an invigorated judiciary." Stephen Landsman,

The Civil Jury in America: Scenes from an Unappreciated History, 44 Hastings L.J. 579, 580-81 (1993). In short, the Founders viewed the civil jury as an important bulwark against all forms of government oppression; it protected against the overzealous prosecutor just as much as it safeguarded against the corrupt judge. *Williams v. Florida*, 399 U.S. 78, 100 (1970); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) (describing jury trials as an "important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary"). *See also Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge.").

The coverage of the Seventh Amendment is "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law." *Shields v. Thomas*, 59 U.S. (18 How.) 253, 262 (1856). Specifically, the term "common law" was used in contradistinction to suits in which equitable rights alone were recognized at the time of the framing

of the Amendment and equitable remedies were administered. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 443, 447 (1830); *Barton v. Barbour*, 104 U.S. 126, 133 (1881).

Petitioner's case is a simple common law damages case. In a copyright case, in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), this Court flatly rejected the notion that a damages case is equitable in nature and that no jury was required. The Court said: "Rather, Columbia merely contends that statutory damages are clearly equitable in nature. We are not persuaded. We have recognized the 'general rule' that monetary relief is legal", *Teamsters v. Terry*, 459 U.S. 558, 570 (1990), and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment. *See Curtis v. Loether*, 415 U.S. 196 (1974) (actual damages are "traditional form of relief offered in the courts of law"); *Tull v. United States*, 481 U.S. 422 (1987). *Pernell v. Southall Realty*, 416 U.S. 363, 416 U.S. 370 (1974) (" '[W]here an action is simply for the recovery . . . of a money judgment, the action is one at law' "), quoting *Whitehead v. Shattuck*, 138 U.S. 146, 138 U.S. 151 (1891); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 369 U.S. 476 (1962) ("Petitioner's contention . . . is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention"); *Gaines v. Miller*, 111 U.S. 395, 111 U.S. 397-98 (1884) ("Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for

money had and received. The remedy at law is adequate and complete"). *See also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

Petitioner suggests that a restrictive *Daubert* standard is simply inconsistent with the Seventh Amendment. Petitioner's case proves this. It is certainly reasonable to say that *Daubert* is nothing more than another evidentiary constraint that limits a jury's exposure to irrelevant or prejudicial information, much the same as hearsay or speculation. However, such a view fails to recognize *Daubert's* use and misuse in the modern day world. This Court may well have intended *Daubert* to give Federal District Courts gatekeeping power over evidence. But, in practice, *Daubert* is increasingly used to deny the right to a trial by jury in civil cases altogether. In Petitioner's case, the District Court considered two *Daubert* motions relating to Petitioner's experts and a Motion for Summary Judgment in one order. The District Court struck one expert based upon FRE 702, then excluded the second expert because he, in part, relied on the first expert and held, that in the absence of experts, Plaintiff had no case. In short, *Daubert* has become the proverbial tail wagging the dog whereby a pretrial ruling based upon a Federal Rule of Evidence is suddenly applied in such a way as to deny the Constitutional right to a trial by jury.

Daubert has shifted substantial adjudicatory power away from juries and into the hands of judges. Chief Justice Stanley Feldman of the Arizona Supreme Court explains why this shift is so dangerous:

> "In my mind, *Daubert* gives trial judges far more authority over civil cases than they ought to have. . . . What I feared would happen eventually, and what has happened, is that instead of having jury trials we now have *Daubert* hearings before the judge. The judge, in effect, then determines the outcome of the case by granting summary judgment. To my mind, this far exceeds any power that the Constitution gave judges over jury trial." Tellus Institute, The Most Influential Supreme Court Ruling You've Never Heard Of, June 2003, at 5, available at http://www.defendingscience.org/upload/-The-Most-InfluentialSupreme-Court-Decision-You-ve-Never-Heard-Of-2003.pdf; at 15 (quoting Arizona State Supreme Court Chief Justice Stanley Feldman) (emphasis added)

Sorting out conflicting facts and determining the appropriate credence to give to competing expert witnesses is the constitutionally safeguarded *purpose* of the jury. *Barefoot v. Estelle*, 464 U.S. 880, 902 (1983); *see also United States v. Cisneros*, 203 F.3d 333, 343 (5th Cir. 2000) ("Credibility determinations are the exclusive province of the jury.").

This Court should grant certiorari in order to return the power to resolve disputed factual issues to where the Constitution says it belongs: The jury.

B. THE DISTRICT COURT AND THE ELEVENTH CIRCUIT WENT FAR BEYOND BEING GATEKEEPERS.

The trial court impermissibly decided that it believed the testimony of Respondent's expert over the testimony of Plaintiff's expert, Wayne Denham, and used that as a basis to exclude Denham. The trial court, in so doing, abandoned its position as a gatekeeper and decided on the issue of credibility, not just admissibility.

The decision of whether one expert witness is more credible than the other is inherently a question for a jury, not a trial judge. By invading this province, the trial court here demonstrated a manifest abuse of discretion. "A judge must be cautious not to overstep its gatekeeping role and weigh facts, evaluate the correctness of conclusions, impose its own preferred methodology, or judge credibility, including the credibility of one expert over another. These tasks are solely reserved for the fact finder." *Apple, Inc. v. Motorola, Inc.*, 757 F.3d at 1314; *see, e.g.*, *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) ("The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact."); *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1293 n. 7 (11th Cir. 2005) ("a district court may not exclude an expert because it believes one expert is more persuasive than another expert"). Yet, this is precisely what the District Court did. For example, on page 12 of

the court's Order it chose to disbelieve plaintiff's expert because of his manner in testifying and because "Denham was unable to give precise answers." Then on page 18 of its Order the Court again believed defense expert over plaintiff's expert regarding the issue that the motorcycle's taillight and instrument panel were on between 70-90 minutes after the wreck, by noting that "According to Kawasaki, this is significant for multiple reasons." The court simply discarded any explanation by Petitioner's expert testimony about this electrical phenomenon, solely because his "inspection was conducted on the day after the accident and does not explain why the motorcycle's meter display remained illuminated for more than an hour after the wreck." The Court simply chose to ignore his testimony and believe that of his adversary. These several instances show the impermissible action of the District in favoring one expert's testimony over another to be able to reach its conclusions. This is error as a matter of law and an abuse of discretion.

And yet, the Eleventh Circuit chose to overlook these errors or, in some instances, even engage in them themselves. This passage, from the Eleventh Circuit opinion, illustrates how the appellate court reviewed the evidence below by simply "re-weighing" it at the appellate level:

> We agree with the district court that Denham's differential analysis was unreliable because he failed to exclude causes (other than the voltage regulator) which the evidence showed reasonably could have caused

> the accident. "Although a reliable differential diagnosis need not rule out all possible alternative causes, it must at least consider other factors that could have been the sole cause of the plaintiff's injury." *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1253 (11th Cir. 2010). There was evidence of such other causes in this case, e.g., excessive speed, operator error. Denham's methodology failed to exclude these alternative possible causes and therefore cannot be relied upon to rule in the voltage regulator as the cause.

Clearly, this is not the type of language which reflects a "gate-keeping" analysis. It weighs and balances credibility. Worse yet, it implies a near impossible standard by excluding an expert because he cannot rule out ALL other possible alternatives. At trial, a plaintiff need only prove his case by a preponderance of the evidence, not rule out all other possibilities. But here the Eleventh Circuit has sanctioned the practice of not even letting an expert take the stand unless he can rule out ALL possibilities that conflict with his opinion. FRE 702 and *Daubert* do not require that.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Arising in antiquity, the right to trial by jury in civil matters at common law was so important to the founding fathers that it was enshrined in the Seventh Amendment. And to hold this right inviolate from intrusion by the courts, they included within the Seventh

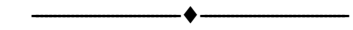
Amendment a provision that, "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." Consequently, damage disputes in the United States have, even before the Constitution, been decided by lay jurors who hear the testimony of competing witness and observe the cross examination and arguments of counsel.

The adoption of the Federal Rules of Evidence and this Court's decision about expert testimony in *Daubert* have provided Federal trial courts with an important tool to insure that "junk science" does not mislead jurors in the discharge of their duties. But that tool should not be used to deny a party the right to trial by jury of the facts of the case or to invade the province of the jury which is charged with the obligation of weighing those facts and ascertaining the credibility of witnesses. There is no doubt that soothsayers and tea leave readers should be, and are, excluded from offering expert testimony in a Federal court, but a disturbing trend has emerged. Unfortunately, the rules are now being applied in such a way as to exclude experts with established credentials in fields like science, medicine and engineering. Worse yet, requests for these overly broad exclusions are now being bootstrapped onto motions for summary judgment in order to get judges to read the depositions of competing experts and decide who they, the judges, believe before the case ever reaches a courtroom or a jury.

Clearly, better guidance is needed and the case at bar presents a classic case for dissection. In one single

order the trial court weighed its assessment of the competing experts, chose to believe those employed by the Respondents and threw the Petitioner out of court in one fell swoop. On appeal, the Eleventh Circuit not only sanctioned this analysis, but joined in with its own weighing and balancing of the facts in a way that would never be sanctioned in some other Federal circuits. Accordingly, the Court is urged to accept this case and outline the proper balancing of a parties right to a jury trial on the facts against the "gatekeeping" function of the judge.

The issue in this case is unquestionably important and is presented with unusual clarity by the circuit conflict. Technological advances keep emerging scientific theories and methodologies at the center of legal disputes. "Proper resolution of those disputes matters not just to litigants, but also to the general public – those who live in a technologically complex society and whom the law must serve." Federal Judicial Center, Reference Manual on Scientific Evidence, Stephen Breyer, Introduction at 2 (National Academies Press 3d ed. 2011) (Reference Manual)



CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Originally filed: June 19, 2016
Re-filed: July 7, 2016

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-13363

D.C. 1:13-cv-03661-ELR

MICHAEL ROPER,

Plaintiff-Appellant,

versus

KAWASAKI HEAVY INDUSTRIES, LTD., KAWASAKI MOTORS CORP., U.S.A., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(March 21, 2016)

Before JORDAN and ANDERSON, Circuit Judges, and KALLON,* District Judge.

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* Honorable Abdul K. Kallon, United States District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM.

For the reasons fully explored at oral argument, for the reasons set out in the district court's comprehensive opinion, and for the reasons briefly outlined below, we conclude that the judgment of the district court should be affirmed. We agree with the district court that plaintiff failed to adduce sufficient evidence to create a genuine issue of fact that the defect in plaintiff's voltage regulator, or defendants' failure to warn of it, caused the underlying accident in which plaintiff was injured.

The district court did not abuse its discretion in excluding the proposed testimony of plaintiff's expert, Denham. The proposed expert testimony of Denham was the primary evidence of causation relied upon by plaintiff. He opined that the voltage regulator failed, allowing the battery to drain down, causing an engine stall, which in turn caused plaintiff to lose control of his motorcycle and crash. We agree with the district court that Denham's testimony was unreliable pursuant to the test set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993). We agree with the district court that Denham's differential analysis was unreliable because he failed to exclude causes (other than the voltage regulator) which the evidence showed reasonably could have caused the accident. "Although a reliable differential diagnosis need not rule out all possible alternative causes, it must at least consider other factors that could have been the sole cause of the plaintiff's injury." *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1253 (11th Cir. 2010). There

was evidence of such other causes in this case, e.g., excessive speed, operator error. Denham's methodology failed to exclude these alternative possible causes and therefore cannot be relied upon to rule in the voltage regulator as the cause.

We also agree with the district court that Denham's differential analysis, and the opinion on causation he derived therefrom, was unreliable for an additional reason. In "ruling in" the voltage regulator as the probable cause of an engine stall, Denham failed to explain how his hypothesis that the voltage regulator caused an engine stall was consistent with certain significant facts. Thus, not only was Denham's opinion unreliable in failing to "rule out" other reasonable causes, it was also unreliable in "ruling in" the voltage regulator as the cause of the accident because it failed to account for data that did not fit Denham's hypothesis. Police photographs of the motorcycle, taken 70-90 minutes after the accident, demonstrated that the lights, including the instrument lights, were still on. Tests conducted by both Denham and defendants' experts established that, when the battery voltage is drained down, the instrument lights always shut off before the engine stalls. Therefore, because plaintiff's lights were still on 70-90 minutes after the accident, there was enough battery voltage even at that later time that low voltage could not have caused an engine stall. Furthermore, it is undisputed in the record that the battery in plaintiff's motorcycle at the time of the accident had to have had a charge of at least 12 volts

because the motorcycle would not have started otherwise. Battery-rundown tests conducted by both Denham and defendants' experts established that a battery with a charge of 12 volts could not have run down (by the time this accident occurred[1]) to the low level required for low voltage to cause an engine stall.[2]

In light of Denham's failure to account for the foregoing extremely strong evidence that the voltage regulator in the instant case could not have caused the accident, and in the complete absence of any plausible way that the voltage regulator could have caused the accident in this case, the district court did not abuse its discretion in concluding that Denham's expert testimony, based as it was on a flawed application of differential analysis, was not reliable. *See Guinn*, 602 F.3d. at 1255 (similarly concluding that expert "testimony was unreliable because her conclusions were not logically supported by the facts of this case").

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[1] The tests (and the fact that plaintiff's lights were still on 70-90 minutes after the accident) established that a battery with 12 volts charge will keep the lights on the motorcycle for nearly two hours. This is true even in the absence of any charge coming from a voltage regulator, and we know that plaintiff's voltage regulator was still providing some charge when it was tested more than a year after the accident. Thus, plaintiff's battery (with at least 12 volts of charge) could not have run down to the point of an engine stall (which always occurs *after* the lights shut off) in the approximately fifteen minutes from the time plaintiff started his motorcycle and the accident occurred.

[2] The tests established that engine stall occurred only when the battery charge fell below 7 volts; the lights always shut off *before* that – e.g., at 7.8 volts.

The district court also acted within its discretion in excluding the expert testimony of Nelson, proffered by plaintiff. We agree with the district court that Nelson's proposed testimony was unreliable because, *inter alia*: He relied on Denham's testimony which itself was unreliable; his proposed opinion was not based on concrete data or testing; and he failed to explain how his experience led him to the conclusions he reached.

We conclude that the district court did not abuse its wide discretion in excluding the proposed expert testimony of Denham or Nelson. We have carefully considered the entire record. We conclude that the evidence in this record is wholly insufficient to establish a genuine issue of fact that any defect in plaintiff's voltage regulator, or any related failure to warn, caused an engine stall which caused this accident. Accordingly, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MICHAEL ROPER, Plaintiff, v. KAWASAKI HEAVY INDUSTRIES, LTD., KAWASAKI MOTORS CORP., U.S.A., and MOTIONS-HONDA-KAWASAKI-SUZUKI-YAMAHA, Defendants.	*	1:13-CV-03661-ELR

ORDER

(Filed Jun. 29, 2015)

Plaintiff Michael Roper filed this suit against Defendants Kawasaki Heavy Industries ("KHI"), Kawasaki Motors Corp., U.S.A. ("KMC"), and Motions-Honda-Kawasaki-Suzuki-Yamaha ("Motions") (collectively, "Kawasaki") seeking to recover for injuries resulting from a motorcycle accident. (Compl., Doc. No. 13.) Presently before the Court are: 1) Kawasaki's Motion to Exclude Expert Testimony of Wayne Denham (Doc. No. 56); Kawasaki's Motion to Exclude Expert Testimony of Randall Nelson (Doc. No. 57); 3) Kawasaki's Motion for Summary Judgment (Doc. No. 69);

and 4) Plaintiff's Motion for Partial Summary Judgment (Doc. No. 73). For the following reasons, the Court concludes Kawasaki is entitled to summary judgment.

I. BACKGROUND

A. Factual Background

This is a product liability action arising out of an accident that occurred on February 27, 2011, while Plaintiff was operating a 2009 Kawasaki Ninja ZX-10R. On that day, Plaintiff cranked the motorcycle and allowed it to run idle for approximately twelve or thirteen minutes while he gathered his gear. (Deposition of Michael Roper 83:22-84:5, Doc. No. 58.) A few minutes after leaving his home, Plaintiff contends he was riding along a curvy stretch of road when the engine suddenly stalled causing him to lose control and collide with an oncoming vehicle. (*Id.* 87:11-89:13.) Plaintiff testified that in the moments before the alleged stall, he looked down at his instruments and "something didn't look right." (*Id*. 88:20-22.) Plaintiff also asserts he felt the back tire lock up. (*Id.* 89:8-9, 90:5-16, and 93:11-15.) As a result of the accident, Plaintiff sustained severe injuries. (*Id*. 104:4-105:12.)

Multiple witnesses saw Mr. Roper on his motorcycle in the moments before the crash, including Robert and Mary Ann Cox, the passengers of the car Mr. Roper struck. (Deposition of Robert Cox 10:8-12:24, Doc. No. 69-8; Deposition of Mary Ann Cox 5:5-8:23, Doc. No. 69-7.) One witness, Donna Smythe, was travelling toward

Mr. Roper in her car as the accident occurred. (Deposition of Donna Smythe Ex. B 19:7-23, Doc. No. 56-5.) She witnessed a portion of the events as she approached Mr. Roper, and then saw him collide with the Cox's car in her rearview mirror. (*Id*.) According to Ms. Smythe, Plaintiff looked down at his feet as he struggled to regain control of the motorcycle. (*Id.* 28:10-14.) After witnessing the accident, Ms. Smythe called 911 and turned around to see if there was anything she could do to help. (*Id.* 19:24-20:9.) Ms. Smythe then knelt beside Plaintiff and waited for the paramedics to arrive. (*Id*.) Another witness, Melton Hood, also passed Mr. Roper in his car just before the accident occurred, and viewed a portion of the events in his rearview mirror. (Deposition of Melton Hood, 16:8-21, Doc. No. 69-10.) According to Mr. Hood, Plaintiff seemed to be travelling at a high rate of speed. (*Id*. 17:8-19, 19:9-17, and 23:17-23.)

A year after the accident, Kawasaki issued a "Warning and Recall Notice" because of a defect with the voltage regulator ("VR") in certain motorcycle models, including the one Plaintiff owned and was riding when he crashed. In basic terms, the VR helps maintain the battery's charge while the engine is running. (*See* Deposition of John D. Loud 24:5-12, Doc. No. 56-8.) In pertinent part, the recall notice provides:

> Kawasaki Motors Corp., U.S.A. has decided that a defect which relates to motor vehicle safety exists in 2008-2010 NINJA ZX-10R . . . models. On eligible units, the voltage regulator can overheat, causing uncontrolled

> current output which can result in insufficient charging current being provided to the battery. This can cause discharge of the battery and can lead to engine stalling and/or a no-start condition. Engine stalling while riding can create the potential for a crash resulting in injury or death.[1]

(Warning and Recall Notice Ex. E, Doc. No. 56-5.) Additionally, Kawasaki sent a letter to the National Highway Traffic Safety Administration ("NHTSA") advising that agency of the defect. (NHTSA Letter Ex. F, Doc. No. 56-5.) At some point after receiving the recall notice, Plaintiff filed suit alleging his wreck was caused by a defective VR. Specifically, Plaintiff contends his motorcycle lost its ability to maintain proper system voltage when the VR failed, which resulted in the engine stalling and Plaintiff losing control of the motorcycle.

Notably, Defendant KM designed and manufactured Plaintiff's motorcycle and then sold the finished product to KMC.[2] In turn, KMC sold the motorcycle to Motions. Plaintiff purchased the motorcycle from Motions on May 5, 2010. As Plaintiff points out, it appears Kawasaki first became aware of potential issues with the VR in September 2009. (Kawasaki Meeting

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[1] Kawasaki issued a similar recall in Canada warning consumers that engine stalling can "result in lost vehicle propulsion which, in conjunction with traffic and road condition [sic], and the rider's reactions, could increase the risk of a crash. . . ." (Canadian Recall Notice Ex. G, Doc. No. 56-5.)

[2] The manufacturer of the VR in Plaintiff's motorcycle, Kokusan Denki, is not a party to this litigation.

Minutes KHI 002035, Doc. No. 56-6.) Thereafter, Kawasaki engaged in discussions with the VR's designer to determine why certain VRs were experiencing "burn-out failure." (*Id*. KHI 002078; Kawasaki Emails to Kokusan Denki Ex. J, Doc. No. 56-7.) Kawasaki's internal documents describe these burn-outs as being caused by insufficient charging of the battery that leads to potential engine malfunction. (Kawasaki Meeting Minutes KHI 002078.) More specifically, Kawasaki determined a small percentage of VRs were overheating due to an inability to control generated current. (*Id*.) As set forth above, Kawasaki's investigation eventually led to a recall.

B. Procedural Background

Plaintiff originally filed this action in the State Court of Gwinnett County, but Kawasaki removed the case to this Court in November 2013. In his Complaint, Plaintiff asserts claims for: 1) strict liability; 2) failure to warn; and 3) negligence. Plaintiff's claim for strict liability is solely against KHI. Significantly, Plaintiff never served Defendant Motions, and Motions is no longer a party to this action.

On August 6, 2014, Kawasaki moved to exclude the expert testimony of Wayne Denham and Randall Nelson. (Doc. Nos. 56, 57.) Shortly thereafter, Kawasaki filed a Motion for Summary Judgment (Doc. No. 69) arguing Plaintiff's claims must fail if the testimony of Denham and Nelson is excluded. Conversely, Plaintiff filed a Motion for Partial Summary Judgment (Doc.

No. 73) asserting that the evidence unquestionably shows the existence of a product defect. On January 15, 2015, the parties appeared before the Court and presented arguments regarding all four motions. After the hearing and at the request of the Parties, the Court deferred issuing a ruling to allow the Parties to engage in settlement negotiations. Because those discussions proved unfruitful, the Court must now wade into the waters of *Daubert*.

II. MOTIONS TO EXCLUDE EXPERT TESTIMONY

A. Standard

Federal Rule of Evidence 702, which governs the admissibility of expert testimony, provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Although the rule, on its face, provides the Court with only limited guidance, the United States Supreme Court's opinion in *Daubert* is instructive. "Unlike an ordinary witness, . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993). Unfortunately, however, a jury may find it difficult to evaluate an expert's opinion. *See id*. Trial courts are therefore tasked with acting as "gatekeepers" to ensure that a proposed expert's testimony is not only relevant, but reliable. *Id*. Put another way, district courts are "charged with screening out experts whose methods are untrustworthy or whose expertise is irrelevant to the issue at hand." *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1250 (11th Cir. 2007).

As the gatekeeper, the trial court must make a "rigorous three-part inquiry" to determine whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

U.S. v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158

F.3d 548, 562 (11th Cir. 1998)). Although there is inevitable overlap among the three prongs of this analysis, trial courts must be cautious not to conflate them, and the proponent of expert testimony bears the burden to show that *each* requirement is met. *Id*.; *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1113-14 (11th Cir. 2005).

Although many factors bear on the court's inquiry, there is no definitive checklist. *Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001); *see also U.S. v. Scott*, 403 F. App'x 392, 397 (11th Cir. 2010) (finding that *Daubert* provides only general guidelines and that the trial judge has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable") (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)). There are multiple ways, for instance, that an individual may be qualified to give expert testimony. Indeed, the text of Rule 702 makes clear that expert status may be based on "knowledge, skill, experience, training, *or* education." Fed. R. Evid. 702 (emphasis added); Fed. R. Evid. 702 advisory committee's note (2000 amends.) ("Nothing in this amendment is intended to suggest that experience alone . . . may not provide a sufficient foundation for expert testimony."); *Frazier*, 387 F.3d at 1260-61.

Likewise, *Daubert* sets forth a list of "general observations" regarding the reliability of a proposed expert's testimony. Factors to be considered include: 1) whether the expert's theory can be and has been empirically tested; 2) whether the expert's theory has

been subjected to peer review and publication; 3) the known or potential error rate of the expert's theory and whether that rate is acceptable; and 4) whether the expert's theory is generally accepted in the scientific community. *Daubert*, 509 U.S. at-593-594. Importantly, not every factor "will apply in every case, and in some cases other factors will be equally important in evaluating the reliability of proffered expert opinion." *Frazier*,
387 F.3d at 1262; *accord* Fed. R. Evid. 702 advisory committee's note (2000 amends.). Thus, the trial court has considerable leeway to determine whether proffered expert testimony is reliable. *Frazier*, 387 F.3d at 1262.

Finally, the district court must assess whether the expert testimony will assist the trier of fact. Put another way, the court must ask whether the expert testimony "concerns matters that are beyond the understanding of the average lay person." *Id*. If the proffered expert testimony "offers nothing more than what lawyers for the parties can argue in closing arguments," it should not be admitted. *Id*. at 1262-63. These principles guide the Court's analysis below.

B. Testimony of Wayne Denham

Plaintiff offers the expert testimony of Wayne Denham to show that the VR in the subject motorcycle was defective and caused Plaintiff's accident. (Opinions of Wayne Denham, Doc. No. 69-14.) Specifically, Denham intends to testify that "the defective voltage

regulator suffered a burnout failure and caused an engine stall that caused Mr. Roper's loss of control and the resulting collision." (Aff. of Wayne Denham Ex. O ¶ 21, Doc. No. 56-9.) Kawasaki argues this testimony should be excluded because Denham is not qualified, his work is not reliable, and his opinions will not assist the trier of fact.

i. Qualification

To support its contention that Denham's expert testimony should be excluded, Kawasaki first argues Denham is not qualified to render opinions regarding the VR in Plaintiff's motorcycle. Denham is a mechanical engineer and holds a B.S. in Mechanical Engineering and Mechanics from Drexel University. (Denham Aff. ¶ 2.) Although he is not currently licensed as a Professional Engineer (PE), Denham passed the Fundamentals of Engineering, an exam which is typically considered the first step to becoming a PE. (Deposition of Wayne Denham 130:5-25, Doc. No. 60.) Additionally, Denham is an ASE-certified Master Technician and Accredited Accident Reconstractionist. (Denham Aff. ¶¶ 6-7.) Concerning work experience, Denham has spent decades in the automotive repair and service industry diagnosing vehicle failures and working with both mechanical and electrical systems. (*Id.* ¶ 3.) Additionally, Denham asserts he has extensive experience working with electrical component parts and has been involved in hundreds of investigations involving mechanical, hydraulic, pneumatic, and electrical systems. (*Id.* ¶¶ 4-5.) Denham also states he has investigated

and provided expertise in the area of vehicle electronics failures, as well as in matters involving motorcycles. (*Id*. ¶ 6.)

Kawasaki attacks Denham's qualifications on multiple grounds. As an initial matter, Defendants point out that Denham is not a licensed engineer. This is of little consequence to the Court's inquiry. If a proposed "expert does not have a degree or license in his or her professed specialty," the matter "goes to the weight of his or her testimony rather than its admissibility." *Dickerson v. Cushman, Inc.*, 909 F. Supp. 1467, 1472 (M.D. Ala. 1995) (citing *United States v. Bilson*, 648 F.2d 1238, 1239 (9th Cir. 1981)). Kawasaki's primary argument, however, is that Denham is not an *electrical* engineer and has very limited experience working with VRs, particularly those in motorcycles.

To support this contention, Kawasaki cites the Court to various responses Denham gave during his deposition. In addition to having Denham admit that he is a mechanical, not an electrical engineer, Defense counsel questioned Denham extensively regarding his experience researching and working with VRs. To that end, Denham acknowledged that he has never taken a class specifically devoted to VRs, never published or written any articles related to VRs, and never worked on a case involving issues with a VR. (Denham Dep. 9:13-10:10, 12:4-8, 177:9-16.) Even so, Denham's working knowledge of VRs is not quite as meager as Kawasaki would have the Court believe. For instance, Denham remarked to Defense counsel throughout his deposition that he routinely worked on automobile (i.e.

cars, trucks, etc.) VRs. According to Denham, both motorcycles and automobiles use the same 12-volt DC system and operate essentially the same way. (*Id*. 9:13-10:4, 117:8-118:14.) Denham acknowledged, however, that the VRs in those respective motor vehicles are comprised of "slightly different" parts. (*Id*. 117:17-19.) In contrast, John Loud – an electrical engineer and expert for the Defense – testified that the VRs in motorcycles and automobiles are "very different systems." (Dep. Loud 17:11-17.) As explained by Mr. Loud:

> If you look at the automotive system, then you're controlling the current to the winding on the rotor, but on this system, you're dealing with a permanent magnet rotor that is always the same. And regulation on the motorcycle system is achieved by shunting current, bypassing the motorcycle loads to regulate it, whereas on the automobile system, you adjust the strength of the rotating field so that the output, all of which is supplied to the car loads, is kept in regulation. So, there are fundamentally two different systems.

(*Id*. 17:17-18:3.) Thus, although both experts seem to agree that there are similarities between motorcycle and automobile VRs, the two systems are hardly identical. A question therefore arises as to whether Denham's general knowledge of VRs and his experience working with that component in automobiles qualifies him to render expert opinions concerning VRs in motorcycles. "The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a

foundation for a witness to answer a specific question." *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994). To that end, the Court has a few hesitations. For instance, when asked about the specific operation of a motorcycle VR charging system, Denham was unable to give precise answers.

> Q. I take it you're aware of the fact that there's a fundamental difference between automotive voltage regulator charging systems and motor cycle charging systems?
>
> A. Well, I mean, they all use similar components. I mean, you have a stater [sic] and you have a regulator, which incorporates the rectifier and the control circuit, and then you have the battery.
>
> Q. Is the magnet in the motorcycle charging system a fixed magnet?
>
> A. I'd probably need to look at the literature. But you have a stater [sic] and a magnet that rotates around it, I believe, or it could be the other way around.
>
> Q. You don't know if it's a fixed magnet or not?
>
> A. I don't know off the top of my head.

(Denham Dep. 129:3-19.) Moreover, as Plaintiff points out, it seems Denham had at least a partial misunderstanding regarding certain general principles of electrical engineering and how motorcycle VRs operate. (*Id.* 140:25-142:22 (discussing Ohm's law); Loud Dep.

76:8-24, 82:10-25 (discussing Denham's misunderstanding of Ohm's law and how a motorcycle VR works)).[3] Thus, although the Court has little doubt Denham is a highly skilled and well-trained mechanical engineer and former automotive technician, it is skeptical as to whether he is qualified to give expert testimony regarding a motorcycle VR. *See generally, Trumps v. Toadmaster, Inc.*, 969 F. Supp. 247 (S.D.N.Y. 1997) (holding mechanical engineer not qualified to testify in case implicating principles of electrical engineering). Even so, the Court finds the most persuasive reason for excluding Denham's testimony is its lack of reliability.

ii. Reliability

Federal Rule of Evidence 702 and *Daubert* both inform the Court's consideration of reliability. As discussed above, a witness may testify as an expert if: 1) the testimony is based on sufficient facts or data; 2) the testimony is the product of reliable principles and methods; and 3) he has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. Additionally, the factors set forth in *Daubert* guide the Court's inquiry. 509 U.S. at 593-594.

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[3] Ohm's law provides that "the strength of a direct current is directly proportional to the potential difference and inversely proportional to the resistance of the circuit." Merriam-Webster's Collegiate Dictionary 1060 (11th ed. 2014).

a. Foundation for Denham's Opinions

Denham seeks to testify that the VR in Plaintiff's motorcycle was defective thus causing the engine to stall and, in turn, Plaintiff's accident (Aff of Denham ¶ 21; Pl's Expert Disclosures, Doc. No. 57-1.) The Court must therefore consider how Denham arrived at this conclusion. Before conducting any independent testing on the subject VR, Denham agreed to conduct joint testing with Richard Oxton, an expert for Kawasaki. (Denham Dep. 25:25-26:8; Dep. of Richard Oxton 26:12-20, Doc. No. 57-10.) Denham and Oxton were able to conduct multiple tests on the VR from Plaintiff's motorcycle to determine if it was performing in accordance with the specifications set forth in Kawasaki's service manual (the "Manual"). (Denham Dep. 31:5-32:13; Oxton Dep. 26:18-27:1.) As an initial matter, the Court notes that upon removing the VR from Plaintiff's motorcycle, Denham and Oxton observed what appeared to be some melting of the polyurethane material inside the VR. (Denham Dep. 68:6-9, 74:22-75:19.) The men then proceeded to conduct a series of tests.

As prescribed by the Manual, Denham and Oxton first measured the voltage of the motorcycle battery at various RPM levels.[4] (Denham Dep. 31:9-15.) At increasing RPMs, Denham and Oxton measured the voltage on the battery as follows:

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[4] Notably, the battery used in testing was not the battery on Plaintiff's motorcycle at the time of the crash. The original battery

RPMs	Battery Voltage
1500	12.65
3000	12.8
4000	12.9
5000	12.98
6000	13.03

(Denham Dep. 40:9-41:11.) Although the VR was incrementally charging the battery, both experts determined that it was not performing up to Kawasaki's specifications. (Denham Dep. 46:21-24; Oxton Dep. 26:21-27:4.) Denham and Oxton repeated this test with the additional step of turning on a load, i.e., turning the tail and turn signal lights on.[5] (Denham Dep. 31:9-14.) With a load on, Denham testified that the voltage in the battery increased by a very small amount, if at all. (*Id*. 47:10-12.) Additionally, Denham and Oxton performed a resistance check on the subject VR in accordance with the procedures set forth in the Manual. (*Id*. 31:22-25.) Specifically, the men used an ohm meter to test the resistance across six terminals within the VR and then compared the values they recorded to the expected values listed in the Manual.[6] (Oxton Dep. 34:19-35:24.) This testing revealed that at least one of the internal circuits in the VR, identified,

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was replaced before this litigation commenced. (*See* Denham Dep. 48:11-13.)

[5] In an electric circuit, a "load" is something that draws or consumes current. (Loud Dep. 129:3-10.) For example, lights and appliances draw current.

[6] Resistance is simply "the opposition offered by a body or substance to the passage through it of a steady electric current." Merriam-Webster's Collegiate Dictionary 1060 (11th ed. 2014).

as W1, was not performing up to Kawasaki's specifications.[7] (*Id*. 75:22-77:1.)

In addition to these joint tests, Denham also conducted four tests independently. Of these four, Denham conducted the first two at a Kawasaki dealership (the "dealership tests"). (Denham Dep. 54:4-57:6.) Both dealership tests involved disconnecting an exemplar VR from a motorcycle and allowing the motorcycle to run until the battery drained down and the engine shut off (*Id.*) As the battery drained, Denham took note of when certain motorcycle systems shut off. (*Id*.) In both tests, the battery started with a charge of greater than 12 volts and was allowed to drain.[8] Significantly, Denham noted that the meter display on the motorcycle went out once the battery reached approximately 7.8 volts. (*Id*. 165:1923.) As the battery continued to drain and dipped below 7 volts, the engine control unit shut off.[9] (*Id.* 165:24-166:9.)

Finally, after reviewing the Kawasaki recall documents, Denham determined that the vast majority of defective VRs experienced burnout failure, charging control system issues, or short circuiting. (*Id*. 86:16-87:21.)

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[7] There are multiple circuits within the subject VR respectively identified as W1, W2, W3, W4, BK/G, and BK. (Denham Dep. 27:3-29:15, 38:11-14.)

[8] Denham referred to one test as the "good battery" test and the other as the "weak battery" test. Denham testified, however, that using a weak battery did not seem to make a difference. (Denham Dep. 61:10-15.)

[9] If the engine control unit shuts off, the engine will stall. (Denham. Dep. 90:1-7; Loud Dep. 83:14-19.)

Accordingly, Denham conducted two tests to determine possible conditions that would result in Plaintiff's motorcycle shutting off. (*Id*.) Significantly, both tests involved completely disconnecting the exemplar VR and allowing the battery to drain to approximately 9 volts. (*Id*. 207:17-208:13.) In the first test (the "heavy load test"), Denham put a load on the charging system of approximately 40 to 50 amps after allowing the battery to drain. (*Id*. 87:9-21, 102:5-9.) When he did so, the motorcycle immediately shut off because it could not maintain the voltage. (*Id.* 87:16-21.) In the second test (the "short circuit test"), Denham used a 20 amp fuse to short a circuit in the VR located at W4/BK.[10] As with applying the heavy load, the short circuit caused the engine to shut off when the battery was in a low voltage condition.[11] (*Id.* 88:14-18.)

Based, in part, on the results of these tests, Denham opines that a manufacturing defect existed in the subject VR and that the defect caused the engine to stall on the date of Plaintiff's accident. (Denham Aff. ¶¶ 9, 17.) In regard to determining that the VR was defective, Denham relied heavily on Kawasaki's internal documents, the testimony of Kawasaki's experts,

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[10] A short circuit is "a connection of comparatively low resistance accidentally or intentionally made between points on a circuit between which the resistance is normally much greater." Merriam-Webster's Collegiate Dictionary 1152 (11th ed. 2014)

[11] As noted above, Denham stated that he disconnected the VR and allowed the battery to drain to conduct the heavy load and short circuit tests. (Denham Dep. 167:5-19.) Although it is unclear from Denham's testimony, the Court assumes he reconnected the VR, at least momentarily, to introduce the short circuit. (*Id*. 88:9-18, 167:5-19.)

and the fact that the polyurethane material inside the VR appeared to have melted due to overheating. (*Id*. ¶¶ 10-12, 14, and 16.) As to causation, Denham contends he conducted a so-called "differential analysis" to determine that the allegedly defective VR caused Plaintiff's engine to stall. (*Id.* ¶¶ 17-21.) in other words, Denham contends he: 1) inspected the entire motorcycle for all possible and reasonable explanations for Plaintiff's engine stall and; 2) ruled out every possibility other than the defective VR. (*Id*.) According to Denham, he "ruled-in" the possibility that the VR caused the engine stall because Kawasaki's internal studies concluded that the defect can lead to engine stall during operation and the VR in question showed signs of being defective. (*Id*.)

b. Reliability of Denham's Opinions

Kawasaki attacks the reliability of Denham's testimony on multiple grounds. First, Kawasaki argues that the joint tests and the dealership tests preclude a finding that Plaintiffs engine stalled before the crash. To support this contention, Kawasaki points the Court to photographs of the accident scene taken by the Cobb County Police Department. In those photos, taken approximately 70-90 minutes after the wreck, Plaintiffs taillight and instrument panel (meter) are both on. (Denham Dep. 52:3-53:2; Loud Dep. 55:1-6, 106:21-24, and 119:16-22.) According to Kawasaki, this is significant for multiple reasons. For Plaintiff to start his motorcycle on the date of the accident, both Denham and Loud testified that the battery voltage must have been

somewhere around 12 volts or greater. (Denham Dep. 61:22-63:16; Loud Dep. 109:7-16.) Assuming the battery voltage began-to decrease, the dealership tests showed that the meter display would turn off at approximately 7.8 volts. (Denham Dep. 165:19-23.) The engine control unit, on the other hand, would only shut off if the battery dipped below 7 volts. (*Id*. 165:24-166:9.) Thus, according to Kawasaki, the photograph taken 70-90 minutes after the accident showing an illuminated meter display indicates that the battery voltage in Plaintiff's motorcycle was necessarily greater than the point at which engine failure occurs.

In response to this argument, Plaintiff contends Kawasaki has failed to account for the actual condition of the *taillight* and meter display from the moment of impact until the time the photographs were taken. This is important, Plaintiff argues, because on-scene personnel handled the motorcycle and there were numerous people "milling around" the scene of the accident. (Aff. of Donna Smythe Ex. N ¶ 4, Doc. No. 56-9.) Moreover, Plaintiff points out that Ms. Smythe testified she did not see the motorcycle's taillights illuminated during the hour immediately following the accident. (*Id*. ¶¶ 3-6, Doc. No. 56-9.) According to Ms. Smythe, she believes she would have noticed if the taillight was on and would have reported it to an officer. (*Id.*) Even so, Ms. Smythe admits she was never in a position to see the motorcycle's meter display and was not on the scene when the above referenced photographs were taken. (¶ 8.) Additionally, Plaintiff does not offer an explanation as to why the battery voltage

would have suddenly increased more than an hour after the wreck. In regard to the meter display, Plaintiff also cites an "Accident Involved Motorcycle Inspection Checklist" in which a post-accident inspection of the motorcycle revealed that the speedometer and odometer were malfunctioning. (Ex. M, Doc. No. 56-9.) However, this inspection was conducted on the day after the accident and does not explain why the motorcycle's meter display remained illuminated for more than an hour after the wreck. (*Id*.)

Kawasaki is also highly critical of Denham's high load and short circuit tests. More precisely, Kawasaki criticizes Denham for conducting these tests under conditions that did not exist at the time of the accident. Before running either test, Denham states that he disconnected the VR and then drained the battery to approximately 9 volts. (Denham Dep. 54:4-15, 207:17-208:12.) However, as confirmed by the joint tests, Plaintiff's VR was providing at least *some* output on the day of the accident. Kawasaki thus argues Denham had no basis for disconnecting the VR entirely. Additionally, Denham concedes that he does not have any evidence to establish that the battery voltage in Plaintiffs motorcycle decreased to 9 volts before the crash. (*Id.* 208:4-12.) Perhaps most significantly, Kawasaki faults Denham for applying an artificial load and for shorting the W4/BK circuit when there is no evidence to suggest either of those events occurred. Concerning the approximately 40-50 amp load that caused the engine to stall, Denham acknowledged that nothing on Plaintiff's motorcycle could cause such a load. (*Id*.

155:22-156:2.) Instead, Denham theorized that something could have occurred in the VR (e.g. a "very high resistance" scenario) that would create a heavy enough load to cause an engine stall. (*Id*. 93:11-94:7.) Denham conceded, however, that he did not have any evidence that such an event occurred. (*Id*. 96:24-97:2.) Additionally, concerning the short circuit test, Denham acknowledged that there was no indication that the W4/BK circuit in Plaintiff's VR had shorted. According to Denham, he was not attempting to determine what *actually* happened in Plaintiff's VR; instead, he was merely attempting to develop possible explanations for the accident. (*Id*. 138:1-7, 206:1-9.)

In defense of Denham's testing, Plaintiff primarily argues that it is difficult, if not impossible, to forensically determine whether his engine stalled before the crash. In other words, Plaintiff contends that when a VR defect causes a motorcycle engine to stall, there is no concrete evidence of the event having occurred. Accordingly, Plaintiff argues, it was appropriate for Denham to employ a methodology that involved considering *possible* causes of engine failure. To support this argument, Plaintiff relies on Kawasaki's internal emails and the testimony of Defense expert Loud.

Plaintiff contends emails between Kawasaki and the VR's designer demonstrate the difficulty of replicating the circumstances in which a defective VR will cause the motorcycle engine to stall. (Kawasaki Emails to Kokusan Denki Ex. J.) The Court disagrees with Plaintiff's characterization of these emails. In a document marked KHI 001210, Kawasaki requests that

Kokusan Denki prepare a summary report regarding why it was having trouble finding a solution to the manufacturing issue that was occurring in a small percentage of VRs. (*Id*.) Although it is unclear from the record, it appears Kokusan Denki prepared a document marked KHI 001962 in response to Kawasaki's request. (*Id*.) In that document, Kokusan Denki asserts that the problem with its VRs was created by an internal adhesive. (*Id*.) Additionally, Kokusan Denki remarked that it was having trouble determining why the adhesive in certain VRs was separating. (*Id*.) Nowhere in that document, however, did Kokusan *Denki* assert that it could not recreate the circumstances in which a defective VR could lead to engine failure. (*Id*.)

The Court also finds that Mr. Loud's testimony lends little, if any, support to Plaintiff's argument. When asked whether there is any specific testing or physical evidence that could be used to determine that an engine stall resulted from a defective VR, Loud testified as follows:

> So, if the voltage regulator had failed and was not putting out any power, and the battery had been the source of power, then under those conditions, you could eventually get a stall because the battery would become depleted, the voltage would go below six volts in this particular case for this motorcycle, and then a stall would occur. After that, if you were to evaluate the battery, you would find that the battery voltage was low and the voltage regulator would not be putting out power.

> So, you would have two points of data to tell you that that's what had occurred.

(Loud Dep. 121:5-16.) The Court is unsure as to how Plaintiff can characterize this testimony as standing for the proposition that it is difficult to determine whether a defective VR caused an engine to stall. In actuality, Loud testified that there are at least two identifiable pieces of evidence of such an event occurring. In fact, Loud went on to opine that the lack of either of those data points in this case indicates Plaintiff's VR did not fail. (*Id.* 121:17-22.)

Finally, Kawasaki criticizes Denham's use of differential analysis to form his opinions. As discussed above, Denham contends he inspected the entire motorcycle and ruled out every possible cause of the engine stall other than the allegedly defective VR. (Denham Aff. ¶¶ 17-18.) Denham's opinion can be broken down as follows: 1) Kawasaki issued a recall on certain motorcycles warning that the VR can overheat which can lead to engine stalling; 2) Plaintiff's motorcycle was included in the recall; 3) The VR in Plaintiff's motorcycle was not performing up to Kawasaki's specifications and in fact showed signs of overheating; 4) Plaintiff says his engine stalled; 5) The motorcycle does not show signs of other mechanical failure or issues that might cause the engine to stall; and therefore 6) The VR in Plaintiffs motorcycle must have caused the engine to stall. Kawasaki is critical of this analysis for two reasons. First, Kawasaki asserts that Denham's testing does nothing to eliminate excessive speed or operator error as the cause of Plaintiff's

accident. Second, Kawasaki argues that Denham's conclusion directly contradicts the results of his testing.

In defense of Denham's methodology, Plaintiff relies heavily on *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002) and *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2d Cir. 2002). Interestingly, neither case discusses the use of differential analysis to show causation. In White, the plaintiffs brought suit against Ford after an F-350 pickup truck ran over and killed their three-year-old son. 312 F.3d at 1002. The child had climbed into the truck, which was parked on a hill, and kicked the gearshift to the neutral position thus causing the vehicle to move forward. *Id*. Tragically, the boy fell from the truck and was run over. *Id*. In seeking to impose liability on Ford, the plaintiffs alleged the parking brake let go despite being set, allowing the truck roll downhill. *Id*. Although Ford offered the alternative theory that the child's father had neglected to engage the parking brake, this argument was refuted by expert testimony demonstrating that the child could not have moved the gearshift if the parking brake was not engaged. *Id*. Significantly, Ford was aware of an issue with the parking brake assembly in its F-series trucks years before the accident occurred. *Id*. at 1003. Even so, it did not formulate and mail out a recall notice until a month after the incident. *Id*. at 1004.

To support their theory of liability, the plaintiffs in *White* offered the expert testimony of a professor of material science and engineering named Dr. Laird.[12]

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[12] Dr. Laird testified that his job involved teaching "how steel is made and molded into useful shapes, how big a rail had to be

Dr. Laird was not an accident reconstruction expert, did not have any training related to designing or manufacturing products, and had never examined a brake assembly before examining the parking brake in the plaintiffs' truck. *Id*. at 1006. Even so, both parties agreed that Dr. Laird was competent to testify that he observed – via scanning electron microscope – wear patterns that indicated the parking brake in the plaintiff's truck had been repeatedly subjected to the problem that Ford discovered years before the accident. *Id*. at 1006-07. Ford, however, argued the trial court erred by allowing Dr. Laird to testify that: 1) the defective parking brake could spontaneously disengage if someone slammed the door or shook the truck; and 2) such spontaneous disengagement actually occurred in the plaintiffs' truck thus allowing it to roll down the hill. *Id*. at 1007. As to the former opinion, the appellate court found that any error would be harmless because Dr. Laird did little more than restate the results of Ford's own testing. *Id*. at 1007-08.

The latter opinion, on the other hand, presented a "close question" because its foundation was "skimpy." *Id*. at 1008. Even so, the court reasoned. that Dr. Laird's metallurgical expertise allowed him to identify wearing patterns on the brake assembly showing it had been subject to the problem identified by Ford, which in turn permitted the inference that the parking brake had disengaged on the day of the accident. *Id*.

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to carry the weight of a railroad and how long it would last, the crystal structure of materials, and how materials break down when stressed." *White*, 312 F.3d at 1006.

Significantly, the *White* court did not characterize Dr. Laird's causation opinion as expert testimony. As the court explained:

> The way Dr. Laird got from the metal wear, showing repeated tip-on-tip engagement, to his opinion on how the accident occurred, did not rely on his metallurgy expertise at all. He just relied on simple logic. He assumed, for purposes of his opinion, that Mr. White had parked on the sloping driveway, engaged the brake, and put the truck in first gear. Mr. White's testimony provided a basis for those assumptions. Dr. Laird testified, based on Mr. White's deposition testimony and an . . . engineer's reports, that the brake must have been engaged, because otherwise the little boy could not have moved the shifter from first gear to neutral. The brake must have let go after the car was shifted into neutral, because otherwise the" truck would not have rolled. And the boy was probably too small to have disengaged the parking brake. This opinion took advantage of Dr. Laird's expertise in metallurgy only for his knowledge that the particular brake had repeatedly engaged in the tip-on-tip position from which spontaneous disengagement could occur. Beyond that, Dr. Laird established no more foundation than anyone trained in any kind of engineering, or even a lay person not trained in engineering, would have to venture the opinion.

Id. Here, Plaintiff argues *White* is indistinguishable from this case and, accordingly, that Denham

should be allowed to testify regarding causation. Specifically, Plaintiff points out that both Denham and Dr. Laird examined the respective products at issue and found evidence tending to show that each product had been subject to a problem identified by the manufacturer. Plaintiff also notes that both Denham and Dr. Laird relied on the product user's testimony in forming an opinion as to causation. In *White*, Dr. Laird relied on the plaintiff's testimony that he engaged the parking brake on the day of the accident. This testimony was bolstered by other evidence which showed the boy could not have moved the gearshift to neutral if the parking brake was not engaged. Here, Denham relied on Plaintiff's testimony that his engine stalled just before the crash. The Court, however, is not persuaded that other evidence "bolsters" Plaintiff's statements. Unlike in *White*, where physical evidence showed the plaintiff's testimony was necessarily true, testing of the subject VR does not support Plaintiff's engine stall theory but rather contradicts it.

Plaintiff, however, argues his statements are supported by the testimony of Donna Smythe and Dr. Daniel Schlatterer. Ms. Smythe, a witness to the accident, testified that Plaintiff appeared to be looking down at his feet as he struggled to regain control of the motorcycle. (Smythe Dep. 28:10-14.) But, as previously discussed, there are multiple reasons why a motorcycle rider might look down after riding off the road. Dr. Schlatterer, on the other hand, testified regarding numerous conversations he had with Plaintiff after the accident wherein Plaintiff remarked that his

motorcycle had "cut off." (Schlatterer Aff. ¶¶ 8-10.) At best, this testimony lends only marginal support to Plaintiff's statements regarding engine failure and does not permit Denham to take the type of logical leaps taken by Dr. Laird in *White*.

Even assuming the evidence in this case bolsters Plaintiff's testimony that his engine stalled, *White* does not support a finding that Denham should be allowed to opine on causation. As has already been discussed, the expert in *White* did not use differential analysis to form his opinions. Moreover, the *White* court recognized that Dr. Laird's causation testimony was essentially a lay opinion and its admittance into evidence presented a close question. 312 F.3d at 1008-09 ("A layman, which is what an expert witness is when testifying outside his area of expertise, ought not to be anointed with ersatz authority as a court-approved expert witness for what is essentially a lay-opinion."). Interestingly, Plaintiff appears to concede that Denham's opinion, like Dr. Laird's, can be characterized as lay testimony. (Pl.'s Resp. to Defs.' Mot, to Exclude Denham 22-23, Doc. No. 56-3 ("Just like the expert in *White*, Mr. Denham arrived at his opinion on how the wreck occurred using simple logic.")) The Court, however, is extremely hesitant to allow causation testimony to come in under the guise of "simple logic" in a complex products liability action. Accordingly, the Court finds, contrary to Plaintiff's assertions, that *White* does not lend support to admitting Denham's causation testimony.

Similarly, the Court finds that *Jarvis* undercuts Plaintiff's arguments regarding the admissibility of Denham's testimony. In Jarvis, the plaintiff filed suit against Ford after her minivan suddenly accelerated, resulting in a serious accident, To support her theory that the cruise control system in the vehicle was defective, the plaintiff offered the testimony of an electrical engineer named Samuel Sero. Mr. Sero hypothesized that unintended electrical connections had caused the vehicle to uncontrollably accelerate. Significantly, Mr. Sero's theory required multiple malfunctions within the cruise control circuitry, and there was no physical evidence that any of these events occurred at the time of the plaintiff's accident. Nevertheless, the district court found Mr. Sero's testimony reliable and denied Ford's motion to exclude. On appeal, the court discussed – but did not rule on – the district court's findings regarding the admissibility of Mr. Sero's expert testimony.

Here, Plaintiff argues Denham's testimony is similar to that of Mr. Sero because his theory of causation is not directly supported by any physical evidence. Additionally, Plaintiff contends the facts of this case are similar to those in *Jarvis* because the evidence suggests a "transient" electrical event caused both accidents. Despite the similarities noted by Plaintiff, the Court finds no support in *Jarvis* for allowing Denham to testify regarding causation. In reviewing the district court's discussion regarding the admissibility of Mr. Sero's testimony, the appellate court noted Mr. Sero sufficiently tested and replicated his theory on a model

that accurately reflected the electrical components of the plaintiff's minivan. In contrast, Denham tested his theory of causation by modifying (i.e., disconnecting the VR) an exemplar motorcycle such that the electrical system did not accurately reflect the circumstances that existed at the time of Plaintiff's wreck. Additionally, it is important to note that Ford did not dispute the *possibility* of Sero's findings; rather Ford protested that the *likelihood* of such events occurring in the "real world" were remote. Conversely, Kawasaki argues that Denham's theory of causation is impossible. Unlike in Jarvis, where there was no physical evidence to support the expert's theory of causation, Kawasaki argues the physical evidence in this case expressly contradicts Denham's opinion.

The Court agrees that *Jarvis* is distinguishable from this case. The expert in *Jarvis*, an electrical engineer, repeated a series of tests and verified his theory that it was physically possible for a particular malfunction to occur in the plaintiff's minivan. In contrast, Denham seeks to testify that, through the use of differential analysis, he determined the VR in the subject motorcycle *actually caused* Plaintiff to crash. Denham is not an electrical engineer and it is unclear from the record what, if any, steps he took to verify his findings. Accordingly, the Court finds Plaintiff's arguments drawing similarities between *Jarvis* and the case *sub judice* unpersuasive.

Finally, the Court turns to address the application of differential diagnosis in products liability cases and to consider Denham's proposed expert testimony in the

light of *Daubert*. As set forth above, "[d]ifferential diagnosis . . . is a standard scientific technique of identifying the cause of a . . . problem by eliminating the likely causes until the most probable one is isolated." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999). Significantly, "most circuits have held that a reliable differential diagnosis satisfies *Daubert*" because it "is a tested methodology, has been subjected to peer review/publication, does not frequently lead to incorrect results, and is generally accepted in the [scientific] community." *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202, 1208 (8th Cir. 2000). As Kawasaki points out, however, differential diagnosis is used primarily in the field of medicine. *See McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233 (11th Cir. 2005) (noting that differential diagnosis involves determining which of two or more medical conditions is the cause of a patient's ailments); *but see McGuire v. Davidson Mfg. Corp.*, 238 F. Supp. 2d 1096, 1102 (N.D. Iowa 2003) (experts permitted to testify that they used differential analysis to determine that substandard wood caused ladder to collapse). Indeed, the Court has been unable to find a single Eleventh Circuit case in which an expert was allowed to testify that he used differential analysis to determine the cause of a motor vehicle accident. Even so, the Court will assume, as Denham contends, that experts in his field routinely use differential diagnosis to determine the cause of mechanical failures. (Denham Aff. ¶ 19.)

Although differential diagnosis itself is generally considered a valid and reliable methodology, an expert

undertaking such an analysis must nevertheless "show through reliable evidence that the remaining cause ruled in as actually capable of causing the condition." *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1342 (11th Cir. 2010). Thus, in this case, Denham was tasked with showing that the VR in Plaintiff's motorcycle was capable of causing an engine stall. The Court cannot say Denham's efforts were successful. As discussed above, photographs taken approximately 70-90 minutes after the accident show that the meter display and multiple motorcycle lights were illuminated. Although Plaintiff contends Kawasaki has failed to account for the actual condition of the lights and meter display from the moment of impact until the time the photographs were taken, be does not offer an explanation as to why the battery voltage would have suddenly increased more than an hour after the wreck. Significantly, this evidence indicates that the battery voltage in Plaintiff's motorcycle was necessarily greater than the point at which engine failure occurs. (Denham Dep. 165:24-166:9.) To account for this seemingly contradictory information, Denham contends that some "transient event" likely occurred in Plaintiff's VR causing the motorcycle's engine to fail (Denham Aff. ¶ 20.) The Court therefore must consider whether Denham's testing demonstrates that such an event could have occurred.

To show that a transient electrical event could have caused Plaintiff's engine to stall, Denham conducted the high load and short circuit tests. Before running either test, Denham disconnected the VR and drained the battery to approximately 9 volts. (Denham

Dep. 54:4-15, 207:17-208:12.) Denham, however, concedes that he does not have any evidence to establish that the battery voltage in Plaintiff's motorcycle decreased to 9 volts before the crash. (*Id*. 208:4-12.) Moreover, it is undisputed that Plaintiff's VR was not entirely disconnected at the time of the crash. Concerning the high load test, Denham acknowledged that nothing on Plaintiff's motorcycle could cause the approximately 40-50 amp load applied during that test. (*Id*. 155:22-156:2.) Even so, Denham theorized that a "high resistance" scenario could have occurred in the VR which might cause the engine to stall; however, he acknowledged he had no physical evidence to support his theory. (*Id*. 93:11-94:7.) Concerning the short circuit test, Denham concedes there was no indication that the W4/BK circuit in Plaintiff's VR shorted. Nevertheless, he shorted that circuit to see if he could cause the engine to stall. Denham has thus not shown, through reliable evidence, that he was justified in "ruling in" a defective VR as the cause of Plaintiff's accident. *Kilpatrick*, 613 F.3d at 1342.

There are additional reasons why the Court finds Denham's differential analysis flawed. To wit, differential analysis requires that the expert compile a comprehensive list of potential causes and explain why each alternative is ruled out. *Id*. at 1342-43. As Kawasaki points out, Denham did nothing to rule out excessive speed or user error as the cause of Plaintiff's accident. Evidently, Denham did not consider these potential causes because he assumed Plaintiff was being truthful when he said his engine stalled. The Court

is not troubled by Denham's reliance on Plaintiff's statement in forming his opinion as to causation. What concerns the Court, however, is that Denham did not conduct any testing to confirm Plaintiff's testimony. Denham seeks to testify that he considered *every* possible cause of the underlying wreck and that he ruled out *every* possibility other than the defective VR. In truth, however, Denham did not eliminate every possible alternative.

The issue presented is essentially whether differential analysis is suited to the facts of the present case. As explained by the Supreme Court in *Daubert*, an analysis under Rule 702 requires that proffered expert testimony be "sufficiently tied to the facts of the case [such] that it will aid the jury in resolving a factual dispute." 509 U.S at 591 (citing *United States v. Downing*, 752 F.2d 1224, 1242 (3d 1985)). Courts often describe this consideration as one of "fit." *Id*. In other words, a methodology used in one case might not be so aptly suited for another. In the medical field, doctors use differential diagnosis to "*systematically and scientifically* rule out specific causes until a final, suspected cause remains." *Kilpatrick*, 613 F.3d at 1342 (emphasis added). If a patient walks in and tells his doctor he is experiencing flu-like symptoms but he is certain he has not contracted the flu, the doctor would surely not rule out that illness based on the patient's words alone. Instead, the doctor would conduct specific tests to confirm (or disprove) the patient's suspicions. Here, the Court anticipates that Plaintiff would likely argue the difficulty of ruling out excessive speed or user error as

the cause of the accident. The Court finds no merit to this argument. Plaintiff's own expert, Ronald Kirk, testified that Plaintiff could have been traveling as high as 50 miles per hour at the time he hit the road.[13] (Dep. of Ronald Kirk 26:13-19, Doc. No. 695.) The speed limit where the accident occurred was 40 miles per hour, and a yellow advisory sign recommended a maximum speed of 30 miles per hour. (Pl.'s Resp. to Defs.' Statement of Material Facts ¶ 8, Doc. No. 83-9.) Despite having this information, Denham did nothing to rule out excessive speed as the cause of the wreck. Further, even assuming that no test exists that would allow Denham to rule out speed as a potential cause, the Court's analysis would be unchanged. A key foundation of differential analysis is that the expert scientifically rules out all but one potential cause. *Kilpatrick*, 613 F.3d at 1343. If there are causes that cannot be excluded, then differential analysis becomes an unreliable method of showing causation.

Denham's testimony appears to be loosely based on the temporal connection between the evidence of overheating in the VR and Plaintiff's subsequent accident. In short, Denham reasons that: 1) Kawasaki issued a recall on certain motorcycles warning that the VR can overheat which can lead to engine stalling; 2) The VR in Plaintiff's motorcycle showed signs of overheating; 3) There are no signs of other mechanical failure or issues that might cause the engine to stall; and therefore 4) The VR in Plaintiff's motorcycle must

[13] Other witnesses believe Plaintiff may have been travelling even faster. (*See* Hood Dep. *Id*. 17:8,19,19:9-17, and 23:17-23.)

have caused the engine to stall. "This is a classic 'post hoc ergo propter hoc' fallacy which 'assumes causation from temporal sequence. It literally means 'after that, because of this' . . . It is called a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a casual relationship.'" *Id*. (quoting *McClain*, 401 F.3d at 1243). Denham simply assumes that, because the VR in question showed signs of overheating and did not perform up to Kawasaki's specifications, the VR must have caused Plaintiffs engine to stall on the day of the accident. This logic does not fall *within* the parameters of reliability established by *Daubert*.

For the reasons set forth above, the Court concludes Denham's causation testimony is unreliable. Even so, the Court will assume for purposes of this Order that Denham's opinion regarding the existence of a product defect is reliable. Kawasaki's Motion to exclude Denham's causation opinion is therefore **GRANTED in part**.

C. Testimony of Randall Nelson

Kawasaki also seeks to exclude the testimony of Randall Nelson, an expert motorcycle driver. According to Plaintiff's initial expert disclosures, Nelson originally intended to testify that:

> engine stall or power loss while riding creates potential for a loss of control and a crash; that Plaintiff was operating the motorcycle in a reasonable and foreseeable manner at the

> time of the incident; that the facts of this incident *are consistent with* power loss and stall created by a defective voltage regulator; that Plaintiff's balance was adversely affected by the engine stall, denying him predictable directional control; and that the engine stall or power loss from the defective voltage regulator proximately caused the crash and resulting injuries to Plaintiff.

(Pl.'s Expert Disclosures 2.) In response to Defendants' Motion, Mr. Nelson's proposed testimony appears to have been modified. As stated in an affidavit attached to Plaintiff's response brief, "it is [Nelson's] opinion to a reasonable degree of certainty that the loss of engine power is the *probable cause* of the accident and injury to Mr. Roper." (*Id.*) As an initial matter, Kawasaki notes that Nelson has not identified any new work or additional evidence to support his switch from "the facts of this case are consistent with power loss" to "the loss of engine power is the probable cause" of the accident. Kawasaki challenges Nelson's opinions as unreliable.

i. Qualification

Although Kawasaki does not dispute that Nelson is qualified to testify as an expert, the Court will briefly discuss Nelson's credentials. According to Nelson, he is a "motorcycle enthusiast, mechanic and consultant," and is associated with a number of motorcycle related organizations. (Nelson Aff. ¶ 2.) Specifically, Nelson's expertise is in the area of riding, driving, and

mechanics. (*Id*.) For more than a decade, Nelson has served as the Technical Director/Technical Inspector for the National Motorcycle Racing Association, National Hotrod Association, American Motorcycle Association/Pro-Star, and the Motorcycle Drag Racing Association. (*Id*.) Additionally, he has inspected and evaluated thousands of vehicles and is a veteran motorcycle rider of more than fifty years. (*Id*.)

ii. Reliability

As set forth above, Nelson now contends his expert opinion is that "the loss of engine power is the probable cause of the accident and injury to Mr. Roper." (Nelson Aff. ¶ 6.) Nelson contends he reached this conclusion based on his personal riding experience, his review of the record, visiting the accident site, and riding an exemplar motorcycle through the accident site multiple times. (*Id*. 3-5.) As the Court did above in relation to Denham's opinions, it must now dig deeper to consider the foundation of Nelson's proposed expert testimony.

The only independent testing Nelson conducted in this case involved riding an exemplar motorcycle through the accident scene approximately five times. (Deposition of Randall Nelson Ex. K 8:16-23, 10:13-16, Doc. No. 57-10.) Specifically, Nelson rode through the scene at: 1) 40 miles per hour and in third gear; 2) 45 miles per hour and in third gear; 3) 50 miles per hour and in fourth gear; 4) 55 miles per hour and in fourth gear; and 5) 57 miles per hour and in fifth gear. (*Id.*

16:21-17:23.) At every speed, Nelson contends the motorcycle easily maneuvered the curve where the accident occurred. (Nelson Aff. ¶ 5.) According to Nelson, this finding, along with his personal experience and his review of the record, led him to conclude that the loss of engine power is the probable cause of the underlying accident. (*Id*. ¶ 6.)

When asked during his deposition how he arrived at the conclusion that the facts of this case are "consistent with" power loss and engine stall, Nelson contends he relied on three things. First, he took into consideration Plaintiff's statement that the engine stalled before the crash. (Nelson Dep. 44:12-45:7.) Additionally, Nelson relied on Ms. Smythe's statement that Plaintiff was "looking down" as he ran off the road during the accident. (*Id*. 66:1-22.) Notably, Nelson acknowledged that there are lots of things that could go wrong with a motorcycle other than an engine stall that would cause a rider to look down. (*Id*. 67:9-18.) Finally, Nelson also considered Kirk's testimony that, in his opinion, Plaintiff was travelling no more than 50 miles per hour when the accident occurred. (*Id.* 61:11-62:15.) Significantly, Nelson testified that he is not expressing the view that the engine actually stalled; rather, he is simply pointing out that the facts he considered are consistent with such an occurrence. (*Id.* 64:15-24.) The Court can only assume Nelson relied on the same evidence in forming his "probable cause" opinion.

As discussed, Nelson now contends the loss of engine power is the probable cause of Plaintiff's accident.

(Nelson Aff. ¶ 6.) As is obvious from the way Nelson phrases his opinion, he presupposes that the engine did, in fact, stall. Although Nelson does not expressly say so in his affidavit, the basis for this assumption is Denham's testimony. According to Nelson, he reviewed Denham's opinion and found it "consistent" with his own. (*Id.*) However, the Court has already considered Denham's causation testimony and found it unreliable. This alone is a sufficient reason to exclude Nelson's testimony. *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1294 (11th Cir. 2005) (affirming the exclusion of multiple experts' testimony when those experts relied on the opinions of another expert that the court deemed unreliable). Even so, the Court will not end its analysis of Nelson's opinions here.

Other than drawing on his experience and reviewing the record, Nelson formed his opinions by riding through the accident site five times on an exemplar motorcycle. Nelson did not do anything to simulate an engine stall while riding through the scene and did not conduct any test to confirm his theory that engine stall creates the potential for a crash. (Nelson Dep. 34:18-23, 38:19-41:19.) From a *Daubert* perspective, Nelson's opinions are troubling. His proposed testimony is not based on concrete data or testing, so it is difficult for the Court to say whether his methodology has been tested and subjected to peer review. Additionally, there is no way for the Court to determine the known or potential error rate of Nelson's conclusions. Nelson is undoubtedly entitled to use his extensive motorcycle related experience as the foundation for his expert

testimony. Fed. R. Evid. 702 advisory committee's note (2000 amends.). However, "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliability applied to the facts." *Id*. Here, Nelson has no basis to testify that engine power loss was the probable cause of Plaintiff's accident. Nelson did not conduct any independent tests on Plaintiff's motorcycle and did not rely on any past experiences to determine that Plaintiff's engine lost power. (Nelson Dep. 64:15-24.) Instead, he simply relied on Denham's causation testimony which the Court excluded. Nelson's opinion, as phrased in his most recent affidavit, is therefore inadmissible.

After unpacking Nelson's work in this case, it is readily apparent that his testimony is only reliable insofar as he intends to opine that *if* the engine in Plaintiff's motorcycle suddenly stalled, it is *possible* that such an event would cause Plaintiff to lose control. Notably, Kawasaki contends that even this opinion is unreliable because Nelson has experienced engine stalls while riding motorcycles on numerous occasions but never once had an ensuing accident. According to Kawasaki, Nelson's experience thus expressly contradicts his opinion. While this may be true, the Court points out that Nelson, unlike Plaintiff, is an expert rider. It is therefore of little consequence that Nelson has never crashed due to engine failure. For the purposes of this Order, the Court therefore assumes

Nelson's testimony is reliable to the extent he opines that, if the engine in Plaintiff's motorcycle suddenly stalled, it is possible that such an event would cause Plaintiff to lose control. Kawasaki's Motion to Exclude the Expert Testimony of Nelson (Doc. No. 57) is therefore **GRANTED in part**.

III. SUMMARY JUDGMENT MOTIONS

A. Standard

"The standard of review for cross-motions for summary judgment does not differ from the standard applied when one party files a motion, but simply requires a determination of whether either of the parties deserves judgment as a matter of law on the facts that are not disputed." *GEBAM, Inc. v. Inv. Realty Series I LLC*, 15 F. Supp. 3d 1311, 1315-16 (N.D. Ga. 2013) (citing *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005)). In other words, "[c]ross-motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed." *United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984) (quoting *Bricklayers Int'l Union, Local 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1023 (5th Cir. 1975)).

A party is entitled to summary judgment only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In this context, "materiality" is

determined by the applicable substantive law; "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, the Court must view the facts in the light most favorable to the party opposing the motion and must draw all reasonable inferences in that party's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The party requesting summary judgment bears the initial burden of showing the Court, by reference to the record, the absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the non-movant has the burden of proof at trial, the movant can support its motion by either: 1) showing the nonmoving party has no evidence to support an essential element of its case; or 2) presenting "affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *See Young v. City of Augusta*, 59 F.3d 1160, 1170 (11th Cir. 1995) (citing *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1970) (quoting *U.S. v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1438 (11th Cir. 1991))). Notably, "it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). However, if the Court determines the movant has carried its initial burden, the non-movant must then "go beyond the pleadings" and demonstrate that there is indeed a

genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324.

Conversely, "[w]hen the *moving* party has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact: it must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial." *Adams v. BSI Mgmt. Sys. Am., Inc.*, 523 Fed. App'x 658, 659-60 (11th Cir. 2013) (quoting *Four Parcels of Real Prop.*, 941 F.2d at 1438) (omissions in original). "[I]f the moving party makes such an affirmative showing, it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (quoting *Four Parcels of Real Prop.*, 941 F.2d at 1438). These standards guide the Court's inquiry below.

B. Analysis

Plaintiff asserts causes of action for strict product liability, negligence, and failure to warn. Although the strict liability claim only pertains to KHI, the other causes of action are against both remaining Kawasaki Defendants. The parties agree Georgia law applies to Plaintiff's claims. Concerning strict liability, Plaintiff alleges the VR in his motorcycle was defective within the meaning of O.C.G.A. § 51-1-11. In pertinent part, that statute provides:

> The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

O.C.G.A. § 51-1-11(b)(1). Although the statute refers to products that are "not merchantable and reasonably suited to the use intended," Georgia courts have construed that phrase to mean that plaintiffs invoking the statute must demonstrate the product in question was "defective." *Id*. (quoting *Center Chem. Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580, 582 (1975)). Significantly, O.C.G.A. § 51-1-11 imposes a "degree of strict liability on manufacturers." *Stiltjes v. Ridco Exterminating Co.*, 256 Ga. 255, 347 S.E.2d 568, 570 (quoting *Ellis v. Rich's*, 233 Ga. 573, 212 S.E.2d 373, 376 (1975)). By adopting a strict liability standard, Georgia places "a burden on the manufacturer who markets a new product to take responsibility for injury to members of the consuming public for whose use and/or consumption the product is made." *S K Hand Tool Corp. v. Lowman*, 223 Ga. App. 712, 479 S.E.2d 103, 106 (1996) (quoting *Robert Bullock, Inc. v. Thorpe*, 256 Ga. 744, 353 S.E.2d 340, 341 (1987)).

Notably, "a strict liability claim lies only against the manufacturer and not against the mere owner of a

product" or its distributor. *Williams v. City Ice Co.*, 190 Ga. App. 744, 380 S.E.2d 341, 342 (1989) (citing *Ellis*, 212 S.E.2d at 376); *accord Wheat v. Sofamor, S.N.C.*, 46 F. Supp. 2d 1351, 1365 (N.D. Ga. 1999). In Georgia, an entity is considered a "manufacturer" of a product if it: 1) actually manufacturers or designs the product; 2). manufactures a component part of a product and the failure of that part to perform properly results in injury to the plaintiff; or 3) assembles component parts into a single item which is then sold under the entity's own trade name. *Freeman v. United Cities Propane Gas of Ga., Inc.*, 807 F. Supp. 1533, 1539 (M.D. Ga. 1992); *see also Alltrade, Inc. v. McDonald*, 213 Ga. App. 758, 445 S.E.2d 856, 858 (1994) (agreeing with the court's holding in *Freeman*). Defendant KHI does not dispute that it is a manufacturer under Georgia law.

It is well established in Georgia that "the requirements of a product claim sounding in negligence are virtually the same as the requirements for strict product liability." *Roberts v. Tractor Supply Co.*, No. 1:14-CV-02332-RWS, 2015 WL 1862900, at *2 (N.D. Ga. Apr. 23, 2015). Thus, to succeed on a product liability claim under either theory, a plaintiff must establish that the product was defective at the time of sale and that its condition proximately caused the plaintiff's injury. *Chicago Hardware & Fixture Co. v. Letterman*, 236 Ga. App. 21, 510 S.E.2d 875, 877-78 (1999). In discussing the elements of defect and causation in its analysis below, the Court will not distinguish between Plaintiff's strict liability and negligence claims.

To succeed on his claim for failure to warn, Plaintiff must demonstrate that: 1) Kawasaki had a duty to warn him that his VR was defective; 2) Kawasaki breached that duty; and 3) the breach of that duty was the proximate cause of his injuries. *Cline v. Advanced Neuromodulation Sys., Inc.*, 17 F. Supp. 1275, 1285 (2014). As to all three causes of action, the Parties' cross-motions for summary judgment are focused on precise issues. On the one hand, Plaintiff contends he is entitled to partial summary judgment as to the existence of a product defect. Conversely, Kawasaki contends it is entitled to summary judgment as to all three of Plaintiff's claims because Plaintiff cannot establish that the VR in his motorcycle caused the underlying accident.

i. Product Liability (Strict Liability and Negligence)

As a general matter, Georgia courts recognize three categories of product defects: 1) manufacturing defects; 2) design defects; and 3) marketing/packaging (i.e. warning) defects. *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671, 672 (1994); *see also Kersey v. Dolgencorp, LLC*, No. 1:09-CV-898-RWS, 2011 WL 1670886, at *3 (N.D. Ga. May 3, 2011) (discussing all three categories of product defects). In this case, Plaintiff alleges there was a manufacturing defect in his motorcycle's VR.

a. Defect

In manufacturing defect cases, "the trier of fact must ask whether the product would have been safe for consumer use had it been manufactured in accordance with the design." *Kersey*, 2011 WL 1670886, at *4. Significantly,

> the plaintiff is not required to show negligence by the manufacturer, but must show that the product, when sold, was not merchantable and reasonably suited to the use intended and its condition when sold is the proximate cause of the injury sustained. It is not necessary for the plaintiff to specify precisely the nature of the defect. He must show that the device did not operate as intended and this was the proximate cause of his injuries.

Id. (quoting *Owens v. Gen. Motors Corp.*, 272 Ga. App. 842, 613 S.E.2d 651, 654 (2005)). Here, Plaintiff argues he is entitled to summary judgment as to the existence of a product defect. To support this contention, Plaintiff relies on the recall, Kawasaki's internal documents, and Kawasaki's "admissions" that the VR in Plaintiff's motorcycle was defective. In contrast, Kawasaki argues the recall and its internal documents are not admissible and further contends the evidence in the record is entirely insufficient to prove the existence of a defect.

At this stage in its analysis, the Court need not consider the admissibility of the recall and Kawasaki's internal documents. Even assuming they are admissible,

"a manufacturer recall does not admit a defect in a particular product, but refers to the possibility of a defect in a class of products." *Bailey v. Monaco Coach Corp.*, 350 F. Supp. 2d 1036, 1045 (N.D. Ga. 2004) (quoting *Bagel v. Am. Honda Motor Co.*, 132 Ill. App. 3d 82, 477 N.E.2d 54, 58 (1985)). The real focus of Plaintiff's summary judgment motion is Defense expert Loud's purported admission that the VR in Plaintiff's motorcycle was defective.

Plaintiff makes a compelling argument, but the Court cannot say Loud's testimony warrants summary judgment as to the existence of a defect. During his deposition, Loud made multiple references to the "defect" in Plaintiff's VR. (Loud Dep. 86:13-16, 90:14, and 124:6-8.) The issue is really one of semantics. In context, Loud's statements refer to his opinion that the VR in Plaintiff's motorcycle: 1) suffered from the issue identified by Kawasaki in its recall notice; and 2) failed to perform in accordance with Kawasaki's specifications. While acknowledging that the VR was not performing as it should, Loud also testified as follows:

> Q. But based upon the testing that you've included, the testing and analysis that's included in your report that's Exhibit 8, it's your opinion that the voltage regulator on the Roper motorcycle would not lead to such a failure at any point, given your testing of it providing some charging?
>
> A. Right. Taking Mr. Denham's test and then my testing, all of which show the same answer, which is, it's only shunting part of the

> current, some of it is still supplying to the motorcycle, and it's giving a marginal or small amount of charge to the battery while it's operating.

(Loud Dep. 41:8-49.) In Georgia, "[a] product is not in a defective condition when it is safe for normal handling and consumption." *Ctr. Chem. Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580, 582 (1975). Here, Loud specifically testified that the VR did not make Plaintiff's motorcycle unsafe. Thus, it is apparent that Loud was not using the term "defective" in its legal sense.

Considering Loud's testimony, coupled with the assumption that Denham could testify regarding the existence of a defect, the Court finds neither party is entitled to summary judgment on this issue.

b. Proximate Causation

To survive a motion for summary judgment on his negligence and strict liability claims, Plaintiff must provide some evidence that a defect in his motorcycle's VR caused his injuries. "[I]n order to satisfy the proximate-cause element and survive summary judgment, there must be evidence reasonably linking [plaintiff's] injury to a discoverable and curable defect in the [product]." *Walker v. CSX Transp. Inc.*, 650 F.3d 1392, 1399 (11th Cir. 2011). Here, Kawasaki's Motion for Summary Judgment is entirely premised on the Court's exclusion of Plaintiff's expert causation testimony. Without expert testimony to establish causation, Kawasaki argues Plaintiff's negligence and strict liability

claims must fail. Plaintiff's response to Kawasaki's summary judgment motion is nearly identical to the brief he filed in response to Kawasaki's Motion to exclude Denham's expert testimony. Plaintiff additionally argues, however, that there is enough evidence on causation to present to a jury even without the testimony of Denham and Nelson. Specifically, Plaintiff argues he can rely on Kawasaki's own engineers to show the existence of a defect in his VR; from there, Plaintiff contends the jury could infer he is telling the truth about the motorcycle stalling because his statements are consistent with eyewitness testimony.[14]

"To establish a cause and effect relationship between the plaintiff's use of the defendant's product and the plaintiff's alleged injuries, the plaintiff must offer proof of both general and specific causation." *Silverstein v. Procter & Gamble Mfg. Co.*, 700 F. Supp. 2d 1312, 1317 (S.D. Ga. 2009). General causation is simply the capacity of the product in question to cause the plaintiff's injury. *Id*. Specific causation requires the plaintiff to go one step further and show the product actually caused the injuries of which he complains. *Id*. In this case, Plaintiff must demonstrate that the VR in his motorcycle failed, causing his engine to stall and the ensuing accident. Significantly, because the Court finds it must exclude Denham and Nelson's causation opinions, Plaintiff must satisfy this burden without the assistance of expert testimony.

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[14] Ms. Smythe testified that Plaintiff looked down at his feet as he ran off the road. Plaintiff contends this testimony is consistent with his statement that the engine stalled.

Under Georgia law, expert testimony is necessary to prove causation if the causal connection between the defective product and the plaintiff's injuries is not "a natural inference that a juror could make through human experience." *Brown v. Roche Labs., Inc.*, No. 1;06-CV-3074-JEC, 2013 WL 2457950, at *8 (N.D. Ga. June 6, 2013) *aff'd*, 567 F. App'x 860 (11th Cir. 2014) (citing *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1302 (11th Cir. 1999)); *Silverstein*, 700 F. Supp. 2d at 1316. Additionally, the expert's testimony must be "based, at the least, on the determination that there was a reasonable probability that the [defendant's] negligence caused the [plaintiff's] injury."[15] *Wheeler v. Novartis Pharm. Corp.*, 944 F. Supp. 2d 1344, 1352 (S.D. Ga. 2013) (quoting *Rodrigues v. Ga.-Pac. Corp.*, 290 Ga. App. 442, 661 S.E.2d 141, 143 (2008)). Here, the question is whether a juror could infer through natural human experience that the VR in Plaintiff's motorcycle caused his engine to stall. Assuming he establishes the

[15] The Court finds it worth noting that, in certain cases, "[expert] testimony stated only in terms of a 'possible' cause *may* be sufficient when supplemented by probative non expert testimony on causation." *See Rodrigues*, 661 S.E.2d at 143 (emphasis in original). Here, Denham's proffered testimony is not that the VR possibly caused Plaintiff's engine to stall; rather, Denham argues he determined – through differential analysis – that the VR in fact caused the engine to stall. The Court has already considered this testimony and found it unreliable. However, even assuming Denham rephrased his causation opinion in terms of mere possibilities, the Court would nevertheless exclude it. Denham conducted two tests to show how the VR could cause the engine to stall. Significantly, Denham only observed engine failure by testing under conditions that did not exist at the time of Plaintiff's accident.

existence of a defect, Plaintiff postulates a juror could infer causation based on his testimony that the engine in fact stalled. At the summary judgment stage, however, the Court requires more than Plaintiff's "personal speculation" as to what happened. *Henson v. Georgia-Pac. Corp.*, 289 Ga. App. 777, 658 S.E.2d 391, 394 (2008). In a case such as this – involving an alleged failure of a complex electrical system – the Court cannot say a juror could infer causation through human experience. Because there is insufficient evidence to establish a causal relationship between the motorcycle VR and the underlying accident, Kawasaki is entitled to summary judgment as to Plaintiff's strict liability and negligence claims.[16]

ii. Failure to Warn

The Court's analysis of Plaintiff's failure to warn claim will be concise. The Parties spend little time addressing this claim in their briefs, and Plaintiff has not cited the Court to evidence in the record concerning the adequacy of the warnings Kawasaki provided when he purchased the motorcycle in question. In the Complaint, Plaintiff alleges Kawasaki failed to warn him of the dangers associated with the allegedly defective VR. However, the Court has already determined that the evidence in the record is insufficient to establish that

[16] In addition to pointing out Plaintiff's lack of evidence regarding causation, Kawasaki offers affirmative evidence that the VR in Plaintiff's motorcycle did not cause the engine to stall. (Loud Dep. 120:13-22.) This too supports summary judgment in favor of Kawasaki.

the VR actually caused Plaintiff's accident. It would be nonsensical to impose liability on Kawasaki for failing to warn Plaintiff of a certain danger when Plaintiff cannot establish that the danger actually caused his injuries. For this reason, summary judgment is warranted on Plaintiff's failure to warn claim. *Miller v. Ford Motor Co.*, 287 Ga. App. 642, 653 S.E.2d 82, 85 (2007) ("Likewise, summary judgment was appropriate on [the plaintiffs'] claim for failure to warn, since that claim was predicated on the allegation that the [product at issue] contained an original manufacturing defect").

IV. CONCLUSION

For the reasons set forth above, the Court **ORDERS** as follows:

1) Kawasaki's Motion to Exclude Expert Testimony of Wayne Denham (Doc. No. 56) is **GRANTED** in part;

2) Kawasaki's Motion to Exclude Expert Testimony of Randall Nelson (Doc. No. 57) is **GRANTED** in part;

3) Kawasaki's Motion for Summary Judgment (Doc. No. 69) is **GRANTED**;

4) Plaintiff's Motion for Partial Summary Judgment (Doc. No. 73) is **DENIED**; and

5) The Clerk is **DIRECTED** to close this case.

SO ORDERED, this 29th day of June, 2015.

/s/ Eleanor L. Ross
ELEANOR L. ROSS
UNITED STATES
DISTRICT JUDGE