IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

RICHARD K. FOLSOM and JAN L. FOLSOM, individually and as co-administrators of the estate of SETH ELLIS FOLSOM, deceased,	
Plaintiffs,	**Civil Action File No. 3:04-CV-42(CDL)**
v.	
KAWASAKI MOTORS CORP., U.S.A.; KAWASAKI HEAVY INDUSTRIES, LTD.; KAWASAKI MOTORS MANUFACTURING CORP., U.S.A.; JOE HOLLIFIELD; BRADY A. STEVENS; and Z.S., a minor,	
Defendants.	

KAWASAKI DEFENDANTS'
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants KAWASAKI MOTORS CORP., U.S.A., KAWASAKI HEAVY INDUSTRIES, LTD., and KAWASAKI MOTORS MANUFACTURING CORP., U.S.A. ("Kawasaki") are entitled to judgment as a matter of law because the opinions of the Plaintiff's hired expert witnesses fail to meet the standards set by the *Daubert* case and its progeny.

STATEMENT OF THE CASE

Plaintiffs are the parents and personal representatives of Seth Folsom, a young person who drowned in Lake Hartwell in 2002 after he was struck in the head by the rear of a Personal Water Craft (PWC) driven by a 14 year old, Defendant Zachary Smith[1] ("ZS"). In addition to negligence claims against Smith and against the adult owner (Stevens) and an adult passenger on the PWC (Hollifield), Plaintiffs have pursued a product liability case against the Kawasaki defendants, who manufactured the 1998 Kawasaki 900 STX Jet Ski.

SUMMARY OF THE ARGUMENT

In support of their product claims, Plaintiffs have named Ronald Simner and Bradley Cuthbertson as expert witnesses to provide opinion testimony at trial. They opine that the 1998 Kawasaki Jet Ski is defective, because it is a jet-propelled boat which lacks the ability to steer without applying the throttle. They opine that the Jet Ski should have been equipped with a rudder prototype of Simner's own design, which he has for years unsuccessfully tried to sell to the PWC manufacturing industry. Kawasaki has proffered the opinion of better qualified, more experienced experts that the design of the 1998

[1/] Mr. Smith turned 18 years old in June of 2005.

Kawasaki and that class of jet propelled PWCs are reasonably safe for the intended uses, accompanied with reasonable and well known warnings, and that the alternative design proposed by Plaintiffs hired experts would itself be unsafe, as is known to the marine design industry.

The plaintiffs' proposed expert witnesses lack sufficient qualifications, their opinions are unreliable and unfounded, and they lack the requisite foundation for admissibility required by Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell-Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993), and its progeny. Without admissible expert testimony, Plaintiffs cannot make out a product liability case, and so the Kawasaki Defendants are entitled to summary judgment, pursuant to Fed.R.Civ.P. 56(c).

STATEMENT OF FACTS

The Incident at Lake Hartwell

During the Memorial Day weekend of 2002, then-14 year old Zach Smith and numerous extended family members met at the Milltown Camp Ground on the shores of Lake Hartwell, in Georgia. Defendant Smith and his family had been coming to camp at this lake once or twice a year for years. (Zach Smith depo. at 36, David Smith at 13). Among the guests this weekend were his

cousin Kimberly Schaffert, and her boyfriend, Seth Folsom. (K. Schaffert at 16).

On the morning of Saturday, May 25, 2002, some of the family members played in the water of a cove near the shore of the camp sites. (See attached Z Smith Exhibit 1). One of them, Defendant Brady Smith, owned a 1998 Kawasaki Jet Ski. (Zach at 20-21, 60). Before the fatal incident that is the subject of this case, Defendant Joe Hollifield was driving the Jet Ski around in circles so that it splashed waves on other family members swimming in the cove. (Mallory Schaffert at 8-9, 9-10, 13, K. Schaffert at 26, 27). Later, Zach wanted to ride the Jet Ski himself. (Z. Smith at 23). He got permission from Brady, and he and Joe went to get gas for the Jet Ski. (Z.Smith at 58). When they returned, Joe first took the Jet Ski out, then returned with Nick Smith, another cousin (Z.Smith at 63). Joe dropped Nick off, and then got on with Zach driving. (Z.Zmith at 64-65). The plan was for Zach to drive the Jet Ski to drop off Joe at his campsite, No. 48 (See Z Smith Ex. 1 attached) and then for Zach to drive the Jet Ski by himself. (Id., at 67-68).

Zach drove the Jet Ski around a point from his campsite to Joe’s. (Id., at 69). As he did, he saw two people floating on an inflatable raft in the water. (Id., 89-90). He testified that the float was about 2/3 of the way from the shore where campsite

48 was located, about 10 yards from the right shore, and that there was between 15 and 20 yards on the left side of the float. (Id., 86-87, Ex.1). When he first saw them on the float, he could have gotten to campsite 48 without steering towards them, as they were closer to campsite 50. (Id., 75, Ex.1). There was about double the distance on the left to avoid the float (Id., 86) and nothing prevented him from going that way. (Id., 90).

The two persons on the float were Kimberly Schaffert and Seth Folsom. (K. Schaffert 34-35). Folsom was laying on his back with his head facing into the lake, and Schaffert was laying on her stomach with her legs trailing in the water, kicking occasionally to keep the float from running ashore. (Id., at 36-37). Schaffert estimates they were 15-18 feet from shore (Id., at 36-37). Schaffert saw Zach and Joe approaching on the Jet Ski, and immediately assumed that they were going to splash them. (Id.,44-45,46,47,50,52-53,57,79,80). She told Seth something to the effect of “oh no, here they’re coming to splash us.” (Id., at 45). She did not want to get her hair wet, so she ducked her head under Seth’s arm. (Id., 47, 57). She saw Zach turning the steering before she ducked (Id., 47).

As Zach approached the people on the float, he considered splashing them with the Jet Ski. (Id., 119). Plaintiffs later learned from Joe that he assumed at the time that Zach was going

to splash the raft. (Debra Smith at 12, David Smith 42-43, Sgt Mark Padgett at 30, see also Complaint, ¶76). Zach let off of from running throttle about 20 yards from the float, intending to coast in. (Z.Smith 77,106). Kimberly testifies that the Jet Ski was coming at them "not very fast." (K.Schaffert 46-47).

Zach testified to what happened next:

> *Well, I rounded the peninsula, and after I saw them in the water I cut off the -- I let go of the throttle, and I was -- and I was coasting. And I thought I could slow down before I got to them without making contact with them, and I didn't -- like I wasn't slowing down fast enough. So like I tried to turn it left, and then I tried to turn it right, and then I tried to turn it left again. And then I -- then I thought that since it wasn't working you had to give it gas to -- to turn it, and when I did, the back end hit him in the head.*

(Z.Smith at 77). Zach was "panicking" and applied full throttle, and he says the back end of the Jet Ski whipped around and hit Seth Folsom in the head, knocking him and Kimberly from the float and into the water. (Id.,96,99). Joe pulled Kimberly from the water, but Seth stayed under. Kimberly starting screaming, and the campers rushed to the water to find Seth. Mallory called 911, and Department of Natural Resources Sgt. Mark Padgett responded to the scene. Mr. Folsom was located and pulled from

the water unconscious. He was taken to a nearby hospital, where he died about 36 hours later.

Sgt. Padgett then took over the investigation of this water fatality for the DNR. (Padgett, 5-6). He and the other law enforcement officers interviewed and took statements from witnesses. Neither Hollifield nor Zach told him about any trouble with steering, either verbally or in their written statements. (Id., 25,30) He personally took possession of the Jet Ski and the instruction manual which came with it. (Id.,22). Later he took the Jet Ski out and tested it, and determined that it was operating normally and consistent with his years of experience with PWCs. (Id.,23-24). As a result of his investigation, Sgt. Padgett determined that the cause of the accident was that Zach, the underaged operator, drove into the cove at a rate of speed greater than idle, with the intent to spray people by flipping the Jet Ski around. (Id.,40). Padgett referred charges to the District Attorney of homicide by vessel, 2nd degree, and misdemeanor charges of operating a vessel without personal flotation devices and operating a vessel within 10 feet of an object in the water above idle speed. (Id.,38). The charges were later dropped.

Zach Smith and his parents claim that Zach did not know before this accident that a jet propelled Jet Ski does not steer

unless the throttle is activated to make the water jet function. He says he did not figure this out until just before this collision, to late too avoid it. (Z.Smith 78). Zach had driven this Jet Ski before, 10 to 15 times as a passenger, and twice by himself the year before. (Id.23,54-55). At the time of the accident he was 14 and had not yet received his South Carolina learner's permit to operate an automobile. (Id.19). His father and Brad had driven him on the Jet Ski as a passenger the year before. (Id. 20-21, D.Smith 24). Zach did not take a training course or read the operators' manual for the Jet Ski. (Id.26). He never noticed any warning labels on the Jet Ski. (Id.30). In particular, no adult ever told him that the Jet Ski would lose steering ability if the throttle is released. (Id.91-92).

Zach estimates his experience on the Jet Ski before this accident was approximately two hours as a passenger, and a half hour as operator. (Id.54-55). His mother had ridden one before, and she knew in five minutes' time that you had to apply the throttle to steer (Debra Smith 24). "That's just the way a Jet Ski is as far as I know." (Id.23). Kimberly Schaffert's neighbor had taught her to ride a different model Jet Ski, and she knew that you had to apply the gas to steer. (K.Schaffert 64-65). Mark Padgett knew this from his own experience when he first bought a PWC, and he trained his own children about this.

(Padgett 56). Zach's parents did not know that he was driving the Jet Ski himself, and might have refused permission had he asked, due to his age and inexperience. (David Smith 28-30).

The owner's manual which accompanies this PWC states:

> *The JET SKI watercraft is not a toy; it is a one to three person high performance Class A power boat… You must know and observe your state's minimum boating age regulations. Kawasaki does not recommend operation of this watercraft by persons under the age required for a driver's license.*
>
> *Don't forget to watch out for other boats, swimmers or obstructions in your path. This is especially critical during a beginner's first exciting ride…*
>
> *Look around you and make sure the path is clear before executing any sudden turns…*
>
> *Releasing the throttle completely reduces the ability to steer. This can cause you to hit an object you are trying to avoid. You must have thrust to turn, so keep the throttle on or apply throttle to maintain thrust at the jet nozzle….*

See attached Exhibit 2.

On each side of the Kawasaki Jet Ski, in front of the operator above his feet, are printed warning labels with similar information about safety. On the right side the label states: "**Releasing the throttle completely reduces the ability to steer.** This can cause you to hit an object you are trying to avoid. You

must have thrust to turn." (Attached Ex. 2, emphasis in original).

In the 2002 edition of the Georgia Department of Natural Resources' "The Handbook! of Georgia Boating Laws and Responsibilities," the DNR advises against reckless operation and driving too closely to other boats, swimmers or obstructions. The Georgia Handbook also advises about PWCs:

> ***Remember – no power means no steering control…****You must always have power in order to maintain control. If you allow the engine to return to idle or shut-off during operation, you lose all steering control. The PWC will continue in the direction it was headed before the engine was shut of, no matter which way the steering control is turned.*

Handbook at 55, attached as Exhibit 3 (emphasis in original). The necessity to apply throttle to steer a jet propelled boat is indeed an obvious, well known and accepted fact in the boating community, and the Coast Guard has never issued any regulations requiring any different design for a PWC. **{cite from Rick? Or another way to say and support this}**

Expert testimony proffered in this case.

One expert witness proffered by Plaintiffs is Ronald Simner. Since 1996 his sole occupation has been testifying for plaintiff lawyers and against the PWC industry. (Simner I at 3,

119). He has no training in accident reconstruction, biomechanics, human factors, warnings or ergonomics and is not an expert in those fields. (Id., 35,47, 58). He has no training or expertise in naval architecture or engineering. (Id., 36). He is not a boat design expert (Id., 36, 57-58). He is not a safety engineering expert. (Id., 36, 46). At the time of his first deposition, he had never personally ridden the product at issue in this case, a Kawasaki 900 STX. He was not aware of the deceleration rate or idle speed of the product, except to hazard a guess. (Id., 31-32).

What Mr. Simner claims to be is an “expert watercraft rider” and the holder of two patents concerning his concept for a rudder for PWCs. (Id., 36). He admits that when he submitted his patents, he necessarily had to claim that his concepts were unique and novel at the time. (Id.,59). He created these rudders in his garage. (Id., 54, Cuthbertson II at 42). Since 1999 he has not sold a rudder for a sit down PWC, except to plaintiff lawyers. (Id., at 35). He admits that one of his designs is unsuitable for any ordinary operators, other than professional racers. (Id., 88). He believes that all watercraft in the world without rudders are defective, and that rudders are the only engineering concept he knows that cures this defect. (Id., 131). His own rudders have been rejected by every manufacturer who

tried the, and never used by any recreational boat manufacturer in America (Id., 139-140, 158-159).

Simner is aware of the engineering concept of design tradeoffs. (Id. 40). But he has never tested his rudders for safety, or whether they would create an additional hazard of cutting injuries to swimmers. (Id. 94-95, Cuthbertson II at 42 **check this**). He is also unaware of the data of the United States Coast Guard regarding the number of injuries caused by rudders every year. (Simner I at 52,56). He is aware of a report from Underwriters' Laboratory which criticizes his rudders (Id., 87). He is aware of the hazards posed by rudders cutting persons. (Id. 91-93).

At the time of his Rule 26 expert report stating that the Kawasaki 900 STX and every PWC like it was defective, Simner had done no testing, and this was true when he was first deposed last year. (Id. 5). At his first deposition he had not even prepared a drawing of his proposed rudder (Id.,10). The proposed rudder would be a never before built prototype. (Id., 14). At that time he had never built a rudder suitable for installation on a 900 STX. (Id.,17-18). No rudder he had ever built would work on the 90 STX without substantial alteration to the PWC. (Id.,37). To install the rudder, he envisioned changing the

steering linkage, scoop intake grate[2] and other aspects of the existing design of the PWC. (Id., 38-40, 148). He drew his rudder concept without ever seeing the craft involved in this case. (Id., 41,43).

As an experienced testifying witness, Simner knew that he had to do some testing in this federal court case. At the time of his first deposition in 2005, he envisioned fabricating a rudder and installing it on an exemplar 900 STX he had obtained, and testing it on Lake Havasu in Arizona. (Id., 10). The only objective of this test was designed to be to prove that watercraft with rudders steer better than those without, something he already knew (Id., 60-61). The test was designed not to learn anything fundamentally new (Id. 61). He did not plan to attempt to replicate the accident conditions (Id., 64). He did not plan to re-apply the throttle as Mr Smith did in the real incident. (Id., 65). He did not plan to do any safety testing or hazard analysis for his rudder design (Id., 142-143).

Instead, he planned to set up a course and drive the PWC with and without rudders directly at an obstacle, let off

[2] At his first deposition Simner did not have a drawing of his scoop intake grate, which he claimed would increase deceleration of the PWC. Without this device, he did not think his rudders would prevent the PWC from hitting the target. (Id., 148-149).

throttle and turn the handlebars, and record the results. He admitted that his test protocol did not follow the off throttle steering protocol J2608 established by the Society for Automotive Engineers committee, of which he was a dissenting member. (Id., 62-63). He admits that no professional society has validated his test protocol (Id., at 71), which was created especially for this litigation with the input and direction of plaintiff's counsel.

However, when it came time to do his testing in 2006, he did not use the rudder concept he testified about in 2005. Instead, he modified one of his existing rudders because the plaintiff lawyer directed him to do so. (Simner II, 186-187). This was also done because he had concerns whether his original concept would work properly. (Cuth. II 25). He also modified the impeller, intake grate and reverse bucket. (Simner II 212). None of his testing was done with the same boat as Mr. Smith was riding. (Id.,219). Not surprisingly, Simner reports that the PWC with rudders steered better off throttle than one without (Simner II 197-199). No testing other than this litigation scenario demonstration was performed, including no safety testing (Simner II 189, Cuthbertson II, 37, 42), although Simner admits his rudder could cut a person. (Id.,189). Although he is aware of testing that shows that his rudders actually increase

the turn radius of a PWC on-power, he has not done any objective testing to refute this. (Id., 194-196). He is aware that his rudders may cause an operator to be thrown off during hard turns at high speed, but he has done no tests to determine that. (Id., 228-229).

The other Plaintiff expert in this case is Bradley Cuthbertson. He holds no college degree. He is not an expert in boat design, naval architecture, marine engineering, human factors, warnings, or accident reconstruction. (Cuthbertson I at 18-19, 20). He did serve in the US Coast Guard operating 100 ton ships, and he has experience racing and riding PWCs. (Id.). He begrudgingly admits his maritime experience “forces” him to conclude that some of the participants in the incident were negligent, and that their negligence contributed to the accident. (Id. At 32-33,35-36). Although he is not a boat designer, he contends his riding experience qualifies him to render opinions about design in this case. (Id.,40-41). He also counts his being hired by plaintiff lawyers since the early 1990s to testify in lawsuits against PWC manufacturers as a part of his qualifications. (Id., 41). Besides issuing a report in this case bearing his personal opinions about PWCs, he also was the test driver for Mr. Simner’s demonstration on Lake Havasu. (Cuth. II, 29, 92).

ARGUMENT AND CITATION OF AUTHORITY

In order to establish that the Kawasaki 900 STX watercraft and every PWC like it in the world was defectively designed, Plaintiffs must present competent expert evidence, because the design issue is a matter to which a jury cannot reach a valid judgment without the aid of a witness with specialized knowledge. Rule 702, Fed. R. Evid.

I. PLAINTIFF HAS FAILED TO ESTABLISH THE FOUNDATION FOR A VALID PRODUCT LIABILITY CLAIM - WHETHER BASED ON STRICT LIABILITY OR ON NEGLIGENCE.

A. Simner and Cuthbertson Do Not Qualify As Design Experts Under Rule 702.

Under Federal Rule 702, expertise must encompass the specific matter at issue. E.g., Thomas v Newton Internat'l Inds., 42 F.3rd 1266, 1269-70 (9th Cir. 1994). Where a proffered expert lacks knowledge, skill or expertise in the design or manufacture of the product at issue, his testimony should be barred. Baltus v. Weaver Div. of Kidde & Co., 199 Ill.App.3rd 821, 837-38, 587 N.E.2d 580 (1st Dist. 1990). Federal courts have repeatedly and consistently disallowed as incompetent opinions from experts who may have been generally qualified in some broad or related field, but unqualified in the specific subject matter in question. E.g., McCormick v. Bucyrus Erie Co., 81 Ill.App.3rd 154, 164-165, 400 N.E.2d 1009, 1016 (3rd Dist.

1980)(trial court properly precluded civil engineer with 23 years of experience with cranes from testifying on the physics of boom design and stress); Perkins v. Volkswagen of America, 596 F.2d 681, 682 (5th Cir. 1979) (trial court properly excluded mechanical engineer from testifying regarding auto design where he lacked any experience in designing automobiles); Poland v. Beaird-Poulan, 483 F.Supp. 1256, 1259 (W.D. La. 1980) (prohibiting witness with a Ph.D. in mechanic engineering from rendering an opinion regarding a chainsaw when witness admitted he "had only marginal experience with chainsaws of any type.").

Simner and Cuthbertson are not boat design experts and have never worked in any phase of the boat building and design industry. They are professional testifiers. Simner's claim to fame is that he built a rudder in his garage that has been rejected by the entire recreational boating industry. Cuthbertson is a former PWC racer who says anybody with experience using a product can be an expert witness (Cuth. I at 78).

B. The Opinions of Plaintiffs' Experts Lack the Scientific Validity Required For Admissibility.

Simner and Cuthbertson's "opinions" in this case are mere advocacy, unscientific paid hunches that are inadmissible under *Daubert* and the Federal Rules of Evidence. In addition to the

requirement that a witness be properly qualified to proffer expert opinions, Rule 702 further requires that the testimony offered assist the trier of fact in understanding the evidence or determining a fact in issue. *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the Supreme Court conferred upon the trial court the role of gatekeeper in determining whether proffered expert opinion is grounded in the "methods and procedures of science," and consists of more than simply "subjective belief or unsupported speculation." 509 U.S. at 590. To assist the trial courts in their gatekeeping function, the Supreme Court articulated four non-exclusive guideposts in evaluating the admissibility of proffered expert opinion, testing, peer review, rate of error, and consistency with the generally accepted method for gathering the relevant scientific evidence. *Id*, at 593-594. Later cases have expanded the guideposts to include such factors as 1) federal design and performance standards; 2) standards established by independent standards organizations; 3) relevant literature; 4) evidence of industry practice; 5) product design and accident history; 6) illustrative charts and diagrams; 7) data from scientific testing; 8) the feasibility of suggested modification; and 9) the risk-utility of suggested modification. *Milanowicz v Raymond* Corp., 148 F.Supp.2d 525, 537, 540 (D.N.J.

2001). Another factor is whether the opinion arises from prior research, as opposed to an alleged test developed solely for litigation.[3] *Daubert v Merrell Dow,* 43 F.3d 1311 (9th Cir.)1995(on remand from US Supreme Court).

The opinions of Simner and Cuthbertson do not meet any of the foregoing criteria. Not only is Simner's rudder not generally accepted in the boating industry, his "testing" is nothing more than an unscientific demonstration concocted specifically for this litigation. His rudder concepts have not been tested in any realistic fashion, they have not been peer reviewed, the error rate is not known, and they have done no feasibility or safety testing to see what consequences would arise from using one of these rudder systems in the real world.

1. The experts performed no scientific testing

The most significant of the factors listed in *Daubert* is whether the proffered opinion has been tested by scientific method. *Cummins v. Lyle Indus.*, 93 F.3d 362, 368 (7th Cir. 1996). "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified."

[3] "[I]n determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office."

Daubert, supra, at 593. The failure to test may alone justify exclusion under *Daubert*. *E.g. Watkins v Telsmith, Inc.*, 121 F.3rd 984, 992 (5th Cir. 1997); *Berry v Crown Equipment Corp.*, 108 F.Supp.2d 743, 754 (E.D.Mich. 2000)(“courts interpreting *Daubert* have considered testability of the expert’s theory to be the most important of the four factors, and this is especially true in cases involving allegations of defect in product design”);

> "[O]ne of the most important aspects of an expert's testimony [in alternative design cases] is whether the proposed modification is feasible and/or compatible with the underlying design." *Milanowicz*, *supra* at 535. Moreover, "even if a modification is feasible, the expert must also address whether that modification will so affect the operation of the device that it makes it ineffective for its intended purpose." Id. at 536. Failure to make such practical determinations before suggesting alternative designs can be grounds for exclusion of expert testimony. See *Watkins*, 121 F. 3d at 992 (excluding expert for failure to provide any data demonstrating that alternative design "would have prevented the accident without sacrificing utility**").** *See also, McGee v. Evenflo Co.*, 2003 U.S.Dist.LEXIS 25039(M.D.Ga. 2003).

In this case the “test” was a stunt, a demonstration to determine if a rudder, and not the one Simner contemplated when

he prepared his Rule 26 report, would steer a heavily modified PWC off throttle. Plaintiff's hired witnesses did not attempt to recreate the accident or the arc that the PWC in this case actually described to bring its rear end into contact with Mr. Folsom's skull, rather than a "snap turn" in place with no lateral transfer. (Simner II at 241).

Moreover, no testing was done to determine what effect on safety these rudders and the other modifications would have, and no objective feasibility testing was done to determine what unintended effects the design additions might create. Even design changes which seem simple can introduce failure modes not even possible in the original design. Federal Judiciary Center, *Reference Manual on Scientific Evidence* at 602 (1994). Under Georgia law, without consideration of these factors and proof that a proposed design alternative was feasible and available at the time, a product design cannot be considered defective, except in the rare hypothetical case (never before seen in Georgia law) in which a product is so dangerous that it should not be made at all. *Banks v ICI Americas,* 264 Ga. 732 (1994)("We reaffirm that under Georgia law a manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury."); *Jonas v. Isuzu Motors,* 210 F.Supp.2d. 1373

(M.D.Ga.2002); *Jones v Amazing Prods., Inc.,* 231 F.Supp.2d 1228 (N.D.Ga.2002)

Both Simner and Cuthbertson editorialized during their depositions that Kawasaki, which does in fact employ naval architects and engineers as boat design experts, are more able than they to develop alternative designs. This is an argument that requiring testing of proposed design modifications as a prerequisite for the admission of expert testimony is unduly burdensome. However, "the history of engineering and science is filled with finely conceived ideas that are unworkable in practice." *Milanowicz*, 148 F. Supp. 2d at 535 (quoting *Stanczyk v. Black & Decker, Inc.*, 836 F. Supp. 565, 567 (N.D. Ill.1993)). The requirement of testing is therefore necessary in most cases to "ensure[] that the focus of the jury's deliberation is on whether the manufacturer *could* have designed a safer product, not on whether an expert's proposed but untested hypothesis *might* bear fruit." *Colon*, 199 F. Supp. 2d at 75 (emphasis added); *see also Stanczvk*, 836 F. Supp. at 568 ("proof of any kind is often expensive to gather").

2. The Plaintiff Experts' opinions do not "fit" the record facts of this case.

In this case, Simner and Cuthbertson's opinions are not admissible under rule 702, merely because they are hired experts who hold them. In *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 658 (7th Cir. 1998), the Court stated: "... An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process. No engineer would put such an unsupported assertion in a scholarly article... Why, then, should courts pay it any heed?

In the instant case, Simner and Cuthbertson acknowledge that no PWC is equipped with Simner's rudder, nor did any PWC made in 1998 have a rudder, nor do any standards require it to this day. Evidence of adherence to a practice within an industry implies a significant degree of reliability, and vice versa. *Hynes v. Energy West, Inc.*, 211 F.3d 1193, 1205 (10th Cir. 2000).

The "testing" that was done in this case was not even intended to recreate the accident. Simner admits that Zach Smith was not headed straight at the float like their test, because he was not a good enough operator to perform a "snap turn" that would bring the rear end of the PWC around into the raft and Folsom's head. (Simner II at 241). For him to bring the rear of the PWC around, he would have to have been offset by some amount, and if it was more than the radius of the transom, the PWC would have missed the raft had it merely continued straight,

(Id., 242) rather than what Smith did, engaging the full throttle. None of the plaintiff expert opinions fit the evidence in this case, because in fact the PWC did not hit the raft because it would not steer without throttle, it hit the raft because Zach Smith panicked and engaged the full throttle, whipping the back end around in an arc which struck the raft.

3. The Court's own experience and common sense is a factor that the Federal Rules allow to be used in considering Plaintiffs' opinions and alleged alternative design.

A District Court's "experience and common sense" is another legitimate *Daubert* factor. *Hein v. Merck Co., Inc.*, 868 F.Supp. 230, 2312 (M.D.Tenn. 1994). As this Court has previously observed, for a manufacturer to be liable for a defective product, there must be adequate proof of a feasible alternative design, not merely contentions that a particular accident (among all the conceivable scenarios in which a product might be placed in the real world) would be prevented with a particular different design. *Bishop v. Bombardier, Inc.*, 399 F. Supp. 2d 1372 (2005).

CONCLUSION

Respectfully submitted,

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RICHARD K. FOLSOM and JAN L. FOLSOM, individually and as co-administrators of the estate of SETH ELLIS FOLSOM, deceased, **Plaintiffs,** **v.** **KAWASAKI MOTORS CORP., U.S.A.; et. Al.**	**Civil Action** **File No. 3:04-CV-42(CDL)**

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties in this action with a copy of the foregoing **Brief in Support of Motion for Summary Judgment** by depositing in the United States Mail a copy of same in envelopes with adequate postage thereon, addressed as follows:

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