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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2020AP1052

EDWARD A. VANDERVENTER, JR. AND SUSAN J. VANDERVENTER, PLAINTIFFS-RESPONDENTS,

v.

HYUNDAI MOTOR AMERICA AND HYUNDAI MOTOR COMPANY, DEFENDANTS-APPELLANTS,

KAYLA M. SCHWARTZ AND COMMON GROUND HEALTHCARE COOPERATIVE, DEFENDANTS.

On Appeal from the Racine County Circuit Court,
The Honorable Eugene Gasiorkiewicz, Presiding
Case No. 16CV1096

BRIEF OF *AMICUS CURIAE* ALLIANCE FOR AUTOMOTIVE INNOVATION

Philip S. Goldberg
SHOOK HARDY & BACON, LLP
1800 K Street, NW, Suite 1000
Washington, DC 20006
(202) 783-8400
pgoldberg@shb.com
Of Counsel

Kendall W. Harrison
(State Bar No. 1023438)
GODFREY & KAHN, S.C.
One East Main Street, #500
P.O. Box 2719
Madison, WI 53701
(608) 257-3911
kharrison@gklaw.com
Counsel of Record

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INTEREST OF *AMICUS CURIAE*

Amicus is the Alliance for Automotive Innovation ("AAI"), which represents virtually the entire automotive industry. Its members include automobile manufacturers that make nearly 99% of all the new cars and light trucks sold in the United States. Its members also include key suppliers to the automotive industry, such as manufacturers of automotive parts and components. AAI's members have an interest in ensuring that allegations of design defect under Wisconsin's tort law are supported by reliable expert evidence, which includes validating a design defect hypothesis through testing, so that liability determinations in Wisconsin courts are fair, follow traditional principles, and reflect sound public policy.

SUMMARY OF ARGUMENT

This appeal arises out of a horrific collision. Mr. Vanderventer was driving his Hyundai Elantra when he was slowing to turn and a teenager rear-ended him at more than 40 miles per hour. As a result, he suffered severe debilitating injuries, fracturing his spine and becoming a paraplegic. Mr. Vanderventer did not just sue the teenager, but also Hyundai. To receive compensation from Hyundai, Mr. Vanderventer must prove that a defect in the Elantra he was driving was a cause of his injury. The trial court allowed

Mr. Vanderventer's expert to suggest such a theory of liability, but it was entirely speculative. The expert never tested his hypothesis.

In 2011, the Wisconsin State Legislature amended the statute governing the admissibility of expert evidence specifically to avoid expert testimony, as here, that is not verified. *See* Wis. Stat. § 907.02; *In re Commitment of Jones*, 2018 WI 44, ¶ 32, 381 Wis. 2d 284, 911 N.W.2d 97. When it comes to challenging scientific and engineering designs, the Court has stated the key to admissibility of expert evidence is "whether the scientific theory or technique on which the expert's conclusions were based was testable (and tested), whether it was subjected to peer review and publication, and whether it was generally accepted in the scientific community." *State v. Hogan*, 2021 WI App 24, ¶ 21, 397 Wis. 2d 171, 959 N.W.2d 658 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993)). In Wisconsin courts, as in the federal judiciary, any allegation of design defect must now be validated to be reliable.

For automobiles, testing is the *sine qua non* of safety. The entire federal regulatory regime governing automobile safety is premised on ensuring that all design standards are "capable of being tested." 49 U.S.C. § 30111(e). Here, Defendants showed the Elantra model at issue was

developed over four years, during which the model and its components were subjected to thousands of crash and sled tests. *See* Def. Br. 12. This testing included the head restraint Plaintiffs' expert theorizes caused Mr. Vanderventer's injury.

By contrast, the expert's supposition for how the head restraint moved to cause Mr. Vanderventer's spinal fractures has never been validated. He never confirmed this theorem, replicated it through testing, or validated it in any scientifically reliable way. Instead, he was allowed to concoct a seat for the jury to view that was manually re-welded into the position he claims occurred. Such a fictitious, in-court visual can be highly prejudicial.

This case epitomizes the risk to justice when a trial court fails to ensure that the expert evidence presented to a jury is based on sound scientific principles. The expert's hypothesis creates an impression of a design defect, thereby providing the jury with justification to award a highly sympathetic plaintiff money—here $32 million—from a perceived "deep pocket" because the real party at fault does not have the resources or insurance to cover the costs of the injury. Sympathy for Mr. Vanderventer's situation is certainly understandable, but the extent of one's injuries does not justify bending Wisconsin's liability or evidentiary laws.

AAI respectfully urges the Court to overturn the ruling below. Wisconsin residents and businesses must be able to rely on the State's courts to follow sound tort law and evidentiary principles in the pursuit of justice, even in difficult situations.

ARGUMENT

I. TESTING PURSUANT TO FEDERAL SAFETY STANDARDS IS THE BASIS FOR DESIGN SAFETY IN MOTOR VEHICLES

In Wisconsin, any claim that a regulated product was defectively designed must be adjudicated within the context of the applicable regulatory regime. The State Legislature has provided that a product is *presumptively non-defective* if it complies with these standards. *See* Wis. Stat. § 895.047(3)(b). The applicable regulatory regime here is governed by the National Traffic and Motor Vehicle Safety Act[1] and the Federal Motor Vehicle Safety Standards (FMVSS) promulgated pursuant to that Act. This entire regulatory regime is predicated on testing automotive parts and systems (not untested hypotheses) to provide reasonable assurances of safety.

Over the past 50 years, FMVSS have focused on a vehicle's crashworthiness for when it is involved in a collision. *See* Initial Federal Motor Vehicle Safety Standards, 32 Fed. Reg. 2408 (Feb. 3, 1967) (codified

[1] 49 U.S.C. §§ 30101-30183.

at 49 C.F.R. pt. 571). As a result, there are now standards that govern nearly every aspect of a car's design, from the location, spacing and assembly of vehicle components and systems, *see* FMVSS Nos. 201-204, to door locks, seat belts and child restraint systems, *see* FMVSS Nos. 206-10, 213, to glazing materials for windows, *see* FMVSS No. 205. Each safety standard is buttressed by testing procedures, many of which are codified in the same rule alongside the safety standard. *See* 49 C.F.R. pt. 571.

In addition, the National Highway Traffic Safety Administration (NHTSA) conducts vehicle crash and rollover tests to evaluate these designs in collisions. *See History of Car Safety*, crashtest.org.[2] Each year, NHTSA oversees 90 to 125 tests on high-volume models that are new or significantly updated. *See* Nick Kurczewski, *NHTSA and IIHS Crash Test Safety Ratings Explained*, Car & Driver (Feb. 27, 2021).[3] NHTSA's tests must comply with laboratory test specifications for each applicable FMVSS. *See* NHTSA, Test Procedures.[4] Since 2010, when NHTSA unveiled an enhanced 5-Star Safety Ratings program, new vehicles receive an Overall Vehicle Score that

[2] https://www.crashtest.org/history-car-safety/

[3] https://www.caranddriver.com/features/g35634275/what-to-know-about-the-wrecks-behind-the-ratings-feature/

[4] https://www.nhtsa.gov/vehicle-manufacturers/test-procedures

combines the results of a frontal crash test, two side crash tests, and rollover resistance tests. *See* NHTSA, *A Drive Through Time*.[5] In 2013, the Elantra model at issue here received such an overall 5-star rating.[6]

With respect to head restraints, NHTSA has had standards in place for more than a half century. *See* 36 Fed. Reg. 22,902, 22,943 (Dec. 2, 1971). NHTSA adopted FMVSS No. 202 to "reduce the frequency and severity of neck injury in rear-end and other collisions." *Id.* 22,943-44. The initial standard specified the location of, and allowable measurements for, an adjustable head restraint, as well as various testing requirements. *See id.* Like other safety regulations, FMVSS No. 202 has been amended multiple times to establish a comprehensive, stringent set of requirements. The current standard establishes precise requirements for location and permissible dimensions of a head restraint, which vary by vehicle type. *See* 49 C.F.R. § 571.202a. It also addresses allowable gaps within a head restraint, removability, retraction for non-use positions, and head restraint strength and energy absorption requirements, among other safety considerations. *See id.*

[5] https://one.nhtsa.gov/nhtsa/timeline/index.html

[6] https://www.nhtsa.gov/ratings

FMVSS No. 202 also details procedures for testing as the primary basis for demonstrating compliance with its regulations, including for measuring head restraint strength, energy absorption, and displacement. *See id.* It addresses elements of crash testing, from specifications of the testing platform to the exact positioning of a test dummy. *See id.* These testing standards are continually updated. *See* U.S. Dep't of Transp., NHTSA Off. of Vehicle Safety Compliance, *Laboratory Test Procedure for FMVSS No. 202aD—Head Restraints—Dynamic Testing* (Jan. 7, 2011)[7] (providing guidance for new testing procedures); U.S. Dep't of Transp., FMVSS; Head Restraints, RIN 2127-AH09, at 100[8] (indicating the agency is committed to refine testing procedures as technology develops).

As Defendants explain in-depth, Hyundai performed a litany of these tests on both the seat back system and the UD Elantra head restraint. R.1298–R.1308; R.1768:14–23, 26–49, 73–79, 92–100. These tests ensured compliance with mandatory FMVSS as well as Hyundai's own, more stringent specifications. R.1244; R.1245; R.1768:14-22. These tests included the FMVSS 202a Head Restraint Energy Absorption Test in which the front

[7] https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/tp-202ad-00_tag.pdf

[8] https://www.nhtsa.gov/sites/nhtsa.gov/files/fmvss/202FinalRule_0.pdf

of the head restraint is impacted with a fifteen pound head form at more than 15 mph and the FMVSS 202a Backset Retention, Displacement, and Strength test where the seat back and head restraints are loaded with increasing force. R.1298–R.1308. The UD Elantra met and exceeded the requirements for these tests and has had no history of problems in the Elantra or any other car. R.1765:140; R.1768:14-22, 92-93; R.1769:145-50. As Defendant points out, other manufacturers have used a similar design and the defect alleged here has never been identified in any other incident.

Plaintiffs' expert's bare hypothesis for how the UD Elantra head restraint performed in this collision stands in stark contrast to this extensive history of testing and usage. He did not conduct a single crash test using a similar seat from a similar car with a crash-test dummy of similar size to Mr. Vanderventer. R.1763:241; R.1765:87. The only crash test performed used a *different* seat from a *different* car with a head restraint in a *different* position than Mr. Vanderventer's head restraint at the time of the crash. R.1765:84–86. The test also included a dummy of a *different* size than Mr. Vanderventer. R.1765:70,74–75,86. Plaintiff's expert's then fabricated a seat, where the head restraints were manually reformed and re-welded to match this theory,

which created a visual misimpression for the jury that the head restraint moved that way during the collision. R.1763:147–48; R.1765:103–05.

Testing a design defect theory is of foremost importance in product liability cases where, as here, product safety is premised on extensive pre-market testing. Many designs "are product- and manufacturer-specific and cannot be reliably determined without testing." *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 870 (7th Cir. 2001). Here, by failing to test his hypothesis, Plaintiffs' expert proffered only an opinion that "cannot fairly be characterized as scientific knowledge." *Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002).

Finally, Plaintiffs' contention the head restraint could have been made stronger does not mean it was defectively designed or malfunctioned in any way. "Academically, it may be argued that all products are defective because they can be made more safe." *Claytor v. Gen. Motors Corp.*, 286 S.E.2d 129, 132 (S.C. 1982). Neither federal regulations nor Wisconsin tort law require every car to be a tank; they require reasonable assurance of safety in accordance with their standards and testing procedures. Wisconsin can keep liability in auto accidents principled by continuing to require wrongful causation of harm, as proven through verified design defect evidence.

II. THE TRIAL COURT FAILED TO ACT AS A "GATEKEEPER" WHEN IT ADMITTED AN EXPERT'S HYPOTHESIS ON DESIGN DEFECT THAT WAS NEVER TESTED

The failure of Plaintiffs' expert to test his design defect theory makes his testimony inadmissible, regardless of how credible his theory may *sound* to a court or jury. The designation of someone as an "expert" provides the witness with a cloak of authority and justice can be undermined when a plaintiff is severely injured and the expert devises a plausible-enough-sounding theory for finding a source of compensation. "Plausibility is not a substitute for evidence, however great may be the emotional wish to believe." E. Bright Wilson, Jr., *An Introduction to Scientific Research* 26 (1952).

In 2011, the Wisconsin State Legislature amended the state's evidentiary requirements in an effort to avoid cases like this one, where untested hypotheses are presented to juries and lead to unfounded liability. *See* Wis. Stat. § 907.02; *Seifert v. Balink*, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816 (explaining the purpose and history of the amendments). The Wisconsin Supreme Court has stated that these amendments created a "heightened standard" mirroring Federal Rule of Evidence 702. *Jones*, 381 Wis. 2d 284, ¶¶ 32. Here, the trial judge was required to be a "gatekeeper" and make threshold determinations that Plaintiffs' expert was putting forth evidence "reliable enough to go to the factfinder." *Id*.

The Wisconsin Supreme Court has also instructed trial courts to look to the federal indicia of reliability. *See id.* ¶ 8 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and its progeny). The first factor for courts to consider is "whether the evidence can be (and has been) tested." *Id*. ¶ 33. The other indicia of reliability include, *inter alia*, whether the methodology has been subjected to peer review or publication, has a high known or potential rate of error, has controlling standards, and is generally accepted in the relevant scientific community. *See id*.; *Daubert*, 509 U.S. at 593-94. Validating a hypothesis through testing, the other enumerated factors, or some other means is now central to the admissibility of expert evidence in the State.

As Supreme Court Justice Stephen Breyer observed with respect to Federal Rule of Evidence 702, "These techniques are neutral in principle favoring neither plaintiffs nor defendants." Stephen G. Breyer, *The Interdependence of Science and Law*, 280 Science 537, 538 (Apr. 24, 1998). They bring a "scientific culture to the courtroom," David L. Faigman et al., *How Good is Good Enough?: Expert Evidence Under Daubert and Kumho*, 50 Case W. Res. L. Rev. 645, 655-56 (2000), and "prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *State v. Giese*,

2014 WI App 92, ¶19, 356 Wis. 2d 796, 854 N.W.2d 687.[9] Otherwise, as demonstrated here, design liability would not be principled.

Plaintiffs' expert fell well short of this standard, and the trial court did not fulfill its gatekeeping function in allowing his testimony. He put before the jury a design theory developed solely for this case that was never tested. He was not required to provide any scientific or historical foundation that this alleged defect can or did occur. And, he was allowed to present a fabricated seat with the head restraint manually deformed in accordance with his theory so the jury could be misled to believe it could or did happen.

The Court should find this evidence inadmissible. Because experts are permitted to reach conclusions on the ultimate issue in a case—here whether the head restraint was defective—their conclusions must flow from well-articulated methodology. *See Oregon v. O'Key*, 899 P.2d 663, 678 n.20 (Or. 1995) (observing expert evidence "that does not meet the judicial standard for scientific validity can mislead, confuse, and mystify the jury"). For today's automobiles, which involve complex scientific and engineering

[9] Studies have also shown that these rules facilitate justice. *See* David G. Owen, *A Decade of Daubert*, 80 Denv. U. L. Rev. 345, 362 (2002). For example, in studying the impact of Delaware's adoption of *Daubert*, the National Center for State Courts (NCSC) found that the "*Daubert* criteria necessitate[s] higher quality experts . . . and expert reports." Nicole L. Waters & Jessica P. Hodge, Nat'l Ctr. for State Courts, *The Effects of the Daubert Trilogy in Delaware Superior Court* 22 (2005).

designs, proof of a design defect requires testing. That did not occur here, violating the Legislature and Supreme Court's commitment to systemic, reliable and predictable expert evidence.

III. AUTO LIABILITY FOUNDED ON UNTESTED, UNRELIABLE EXPERT EVIDENCE SUBVERTS JUSTICE AND VEHICLE SAFETY

It has been the experience of AAI, its members and their counsel that when courts admit expert testimony that has not been properly validated, automobile manufacturers are particularly susceptible to "deep pocket jurisprudence." Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359, 395-404 (2018) (discussing automobile cases). In these cases, a jury awards a severely injured plaintiff a large recovery, not against the wrongdoer—here the teen who struck Mr. Vanderventer—but the automobile manufacturer because the wrongdoer does not have sufficient resources to cover the considerable costs of the plaintiff's injuries. Automobile manufacturers must not become the insurers of last resort for all severe collisions involving their vehicles.

Appellate courts are regularly called upon, as this Court is here, to apply the law dispassionately when a trial court issues an errant ruling that leads to an unfounded recovery. For example, over the past decade the

Supreme Court of Virginia heard a trilogy of such automobile cases, overturning the admissibility of expert testimony in each one. *See Funkhouser v. Ford Motor Co.*, 736 S.E.2d 309 (Va. 2013); *Hyundai Motor Co. v. Duncan*, 766 S.E.2d 893 (Va. 2015); *Holiday Motor Corp. v. Walters*, 790 S.E.2d 447 (Va. 2016).

Although each case presented a separate evidentiary issue, the Virginia high court reiterated in each case that trial courts are not to admit expert testimony that does not meet reliability standards. In the Virginia case that was comparable to the one here, the court found the expert did not create an adequate foundation for his design defect theory because he "performed no testing." *Walters*, 790 S.E. at 459. The expert also similarly presented a highly prejudicial in-court demonstration. Thus, the trial court "abused its discretion in admitting it." *Id.* The Court should follow this reasoning here.

Finally, the consequences of such an errant ruling can reach people far beyond the specific case. Federal standards and manufacturer testing help balance the types of occupants and collisions in order to identify risks and determine how to best prevent or mitigate them. No component can be made to protect all injuries in all accidents, and designs often represent trade-offs, as making a car safer in one way could create higher risks in others. Allowing

unfounded allegations of design defect to shift this delicate balance and force re-designs of safe components could lead to greater harm in other collisions. It also would undermine Wisconsin's presumption that a product is non-defective if it complies with government standards.

CONCLUSION

For the reasons set forth above, *amicus* respectfully urges the Court to reverse the trial court's order and find the design defect theory espoused in this case inadmissible.

Dated this 23rd day of December 2021.

Respectfully submitted,

GODFREY & KAHN, S.C.

By:

Electronically signed by Kendall W. Harrison

Kendall W. Harrison
(State Bar No. 1023438)
One East Main Street, #500
P.O. Box 2719
Madison, WI 53701
(608) 257-3911
kharrison@gklaw.com

Counsel of Record for the Alliance for Automotive Innovation

Philip S. Goldberg
SHOOK HARDY & BACON, LLP

1800 K Street, NW, Suite 1000
Washington, DC 20006
(202) 783-8400
pgoldberg@shb.com

Of Counsel for the Alliance for Automotive Innovation

FORM AND LENGTH CERTIFICATION

I hereby certify that this conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,995 words.

Dated this 23rd day of December 2021.

Electronically signed by Kendall W. Harrison
Kendall W. Harrison

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