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APPEAL NO. 2020-AP-1052

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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. 16-CV-1096

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL INC.

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association of corporate members representing a broad cross-section of product manufacturers.[1] PLAC seeks to contribute to the improvement and reform of law, with emphasis on products liability law. Its perspective is derived from corporate membership spanning a diverse group of industries in various facets of the manufacturing sector. Additionally, several hundred leading product litigation defense attorneys are non-voting members. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law.

In 2011, the Wisconsin Legislature enacted significant reforms to products liability law, including restricting the admission of subsequent remedial measure evidence and creating a presumption of non-defectiveness when products comply with government standards. The circuit court negated these reforms when it admitted irrelevant and highly prejudicial evidence of subsequent remedial measures under the guise of impeachment, and admitted unrelated recalls under the pretense of rebuttal. PLAC's members are interested in ensuring that Wisconsin's

[1] *See* https://plac.com/PLAC/About_Us/Amicus/PLAC/Amicus.aspx.

statutes are enforced as written, and that irrelevant and highly prejudicial evidence is not permitted to eclipse the relevant evidence in a case.

SUMMARY OF THE ARGUMENT

Common sense and experience teach that jurors, if allowed to do so—and prodded by an able advocate—will readily equate smoke with fire. For example, jurors hearing evidence that there has been a change in the design of a product accused of malfunctioning and causing an injury are likely to assume the earlier design was defective. And jurors hearing that a vehicle is the subject of a recall might assume that the recall itself demonstrates the existence of a defect. In this case, the jurors heard both, resulting in a multi-million-dollar verdict against Hyundai that cannot stand.

Even though the issue was whether the seat in the 2013 Hyundai Elantra was defective, and if so, whether it caused Plaintiffs' injury, the circuit court allowed extensive prejudicial evidence and argument suggesting the 2013 Elantra was defective for not being a 2017 Elantra, as "rebuttal" to Hyundai's "general defense of the case."

Likewise, because Hyundai relied on the presumption of non-defectiveness of its vehicle based on compliance with government standards, the court allowed as "rebuttal" evidence that over the last 30 years, Hyundai and its sister company's vehicles had been subject to 85 recalls, none of them related to the defect alleged in this case.

ARGUMENT

I. IN 2011, THE WISCONSIN LEGISLATURE REFORMED PRODUCTS LIABILITY LAW.

2011 marked a sea change in Wisconsin products liability law. Previously, Wisconsin courts held that under Wis. Stat. § 904.07, evidence of design changes in subsequent product models was admissible as substantive evidence of a defect in strict liability cases, *Chart v. General Motors Corp.*, 80 Wis. 2d 91, 101–02, 258 N.W.2d 680 (1977), and as impeachment evidence in negligent design cases, *D.L. by Friederichs v. Huebner*, 110 Wis. 2d 581, 610–611, 329 N.W.2d 890 (1983). But in 2011, the Legislature reversed *Chart* by enacting Wis. Stat. § 895.047(4):

> In an action for damages caused by a manufactured product based on a claim of strict liability, evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purpose of showing a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction. This subsection does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time when the product was sold.

In this same statute, the Legislature enacted a rebuttable presumption of non-defectiveness for products that comply with government standards:

> Evidence that the product, at the time of sale, complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law

> or agency shall create a rebuttable presumption that the product is not defective.

Wis. Stat. § 895.047(3)(b).

By their plain terms, the statutes prohibit circuit courts from admitting highly prejudicial, minimally probative evidence and specifically provide a meaningful defense for makers of regulated products. Courts must enforce Wisconsin Statutes according to their plain language. "Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. [The court] assume[s] that the legislature's intent is expressed in the statutory language." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110.

In both instances here, the circuit court's rulings had the effect of reverting to pre-2011 law.

II. THE CIRCUIT COURT'S SUBSEQUENT REMEDIAL MEASURES RULINGS EFFECTIVELY REINSTATED PRE-2011 LAW.

Despite § 895.047(4)'s substantial exclusion of subsequent remedial measure evidence, the circuit court admitted evidence of the **2017** Hyundai Elantra's seat design, in a case involving the seat design

of a **2013** Elantra.[2] Its holding rested on § 895.047's exception allowing evidence that a "reasonable alternative design [] existed at the time when the [Elantra] was sold." Alternatively, it referred to § 904.07's "impeachment" exception to rebut Hyundai's "general defense of the case." Rather than properly treat these exceptions as "instances in derogation of the general legislative intent [that] should, therefore, be narrowly construed," the court used them to swallow the rule. *Hathaway v. Green Bay Sch. Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984).

A. The Circuit Court Misapplied Wisconsin Statute § 895.047(4), Creating An Exception At Odds With Its Plain Language.

Section 895.047(4) permits evidence of subsequent remedial measures to "show a reasonable alternative design that existed at the time when the product was sold." The circuit court ignored the plain language of the statute, which only permits evidence of an alternative design for the product that existed "when the product was sold." By allowing evidence of a conceptual in-research design—not one available for use

[2] PLAC uses the term "subsequent remedial measure" because it reflects statutory language, its historical use in Wisconsin, and the arguments below. But as this case exemplifies, and as many courts have recognized, manufacturers frequently implement design changes for reasons other than to "remedy" a safety concern. *See, e.g.*, *Meller v. Heil Co.*, 745 F.2d 1297, 1300, n.8 (10th Cir. 1984).

in the relevant time frame—the circuit court rendered superfluous the statute's express language and negated the principal rule in most cases.[3]

The distinction between a "design" and one "that existed" is not mere semantics. Section 895.047(4) relates to manufactured products. For most products—and particularly for automobiles—while a current model is being sold, manufacturers are already working on the next design. That design and development process involves not just redesigning specific components, but ensuring they function appropriately together. Interpreting "subsequent remedial measures" to include conceptual drawings that have not yet been incorporated into a finished product ignores the realities of the industry that § 895.047(4) governs.

This underscores the absurd results flowing from the circuit court's ruling.[4] The statute's plain words prevent plaintiffs from identifying a feature in a *subsequent* model to prove a defect in an *earlier* one. The circuit court's ruling violates this rule and, if upheld, would

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[3] "Each word should be looked at so as not to render any portion of the statute superfluous." *Hubbard v. Messer*, 2003 WI 145, ¶ 9, 267 Wis. 2d 92, 673 N.W.2d 676; *see also State ex rel. Reimann v. Circuit Court for Dane County*, 214 Wis. 2d 605, 619, 571 N.W.2d 385 (1997) ("[I]t is a basic rule of statutory construction that courts are to give effect to every word of a statute, if possible, so that no portion of the statute is rendered superfluous.").

[4] The Court must reject a statutory construction that leads to absurd results. *In re Commitment of Hager*, 2018 WI 40, ¶ 18, 381 Wis. 2d 74, 911 N.W.2d 17 ("We interpret the statute in its full context in order to avoid creating absurd results or rendering any statutory language surplusage.").

allow that outcome in nearly every case. Allowing evidence of conceptual, in-progress designs that are not yet implemented in a product would defeat the principal rule of exclusion and create an exception that swallows the rule.

B. The Circuit Court Misapplied Wisconsin Statute § 904.07's Exceptions.

The circuit court also referred to § 904.07 to justify its ruling. This statute provides that subsequent remedial measure evidence is inadmissible in most cases, but can be admitted to show "feasibility of precautionary measures, if controverted, or impeachment[.]" Though the court's ruling relied on "impeachment"—holding Plaintiffs could present the 2017 model to impeach Hyundai's "general defense of the case"—Plaintiffs argue on appeal that the evidence was also admissible under the "feasibility" exception.

Neither impeachment nor feasibility permitted Plaintiffs to invoke these exceptions as a ruse to admit improper evidence.

1. The circuit court allowed supposed "impeachment" to work as a subterfuge for improper evidence.

Even before the 2011 reforms, the Wisconsin Supreme Court warned that § 904.07's impeachment exception must not be a backdoor to "prove[] negligence under the guise of impeachment." *Huebner*, 110 Wis. 2d at 607–08. But that is what happened. Impeachment is not

evidence that counters the "general defense of the case." If it were, the impeachment exception would swallow the rule and allow plaintiffs to "make devastating use at trial of any measures . . . taken since the accident . . . ." *Flaminio v. Honda Motor Co*., 733 F.2d 463, 469 (7th Cir. 1984).

Courts around the country have made it clear that the "impeachment exception must not be used as a subterfuge to prove negligence or culpability." *Harrison v. Sears, Roebuck & Co.*, 981 F.2d 25, 31 (1st Cir. 1992). Because "any evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach [a party's] testimony," a court "must interpret the impeachment exception . . . circumspectly." *Complaint of Consolidation Coal Co.*, 123 F.3d 126, 136 (3d Cir. 1997) (internal quotations omitted); *see also Flaminio*, 733 F.2d at 468; *Lidle v. Cirrus Design Corp.*, 278 F.R.D. 325, 332 (S.D.N.Y. 2011), *aff'd*, 505 F. App'x 72 (2d Cir. 2012); *City of Richmond, Va. v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 460, n.21 (4th Cir. 1990); *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1212 (10th Cir. 2006); *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1567 (11th Cir. 1991).

Allowing subsequent remedial measure evidence to impeach a general "trial position" is "precisely what [the statute] was designed to prevent." *Hardy v. Chemetron Corp.*, 870 F.2d 1007, 1011 (5th Cir.

1989); *Minter*, 451 F.3d at 1213; *Bickerstaff v. S. Cent. Bell Tel. Co.*, 676 F.2d 163, 168–69 (5th Cir. 1982); *Consolidated Coal Co.*, 123 F.3d at 136; *Harrison*, 981 F.2d at 31; *Probus v. K-Mart, Inc.*, 794 F.2d 1207, 1210 (7th Cir. 1986).

There can be no serious doubt that was what occurred here. Indeed, the circuit court permitted Plaintiffs to use this evidence in opening even though at that time there was no evidence to "impeach." This resulted in Plaintiffs' "devastating use at trial" of a subsequent model to invite the jury to disregard the facts of the case and find the 2013 Elantra defective because it was not a 2017 model. *Flaminio*, 733 F.2d at 468.

2. Section 904.07's feasibility exception does not apply.

Although the circuit court did not rely on a feasibility exception, Plaintiffs now maintain that this exception also applies. It does not. Before subsequent remedial measure evidence is admissible to show "feasibility," an opponent must first "controvert[]" feasibility. Wis. Stat. § 904.07. Hyundai did not.

"'Feasibility' is not an open sesame whose mere invocation parts [the rule] and ushers in evidence of subsequent repairs and remedies. To read it that casually will cause the exception to engulf the rule." *In re Joint E. Dist. & S. Dist. Asbestos Litig.*, 995 F.2d 343, 345 (2d Cir. 1993).

Rather, as § 904.07 expressly provides, and as courts around the country have recognized in applying the federal analog, Fed. R. Evid. 407, for the "feasibility" exception to apply, the defendant must actually contest that a subsequent measure was feasible. *See Wanke v. Lynn's Transp. Co.*, 836 F. Supp. 587, 595 (N.D. Ind. 1993); *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 633 (8th Cir. 2007); *Kelly v. Crown Equipment Co.*, 970 F.2d 1273, 1278 (3d Cir. 1992); *Grenada Steel Industries v. Alabama Oxygen Co.*, 695 F.2d 883, 888 (5th Cir. 1983).

Because feasibility was not contested, this exception did not provide a basis to admit this irrelevant evidence.

III. THE CIRCUIT COURT ERRED IN ADMITTING EVIDENCE OF UNRELATED RECALLS.

The 2011 reforms also created a presumption that a product is non-defective if, at the time of sale, it complied with relevant government standards. Wis. Stat. § 895.047(3)(b). Under the pretense of rebuttal to this presumption, the circuit court allowed Plaintiffs to present evidence of 85 unrelated voluntary recalls involving Hyundai and Kia vehicles over the last 30 years. These unrelated recalls are not rebuttal, and their inclusion permitted Plaintiffs to "lead the jury far astray of the allegations in this lawsuit." *Olson v. Ford Motor Co*, 410 F. Supp. 2d 869, 875 (D.N.D. 2006).

A. Courts Uniformly Limit Evidence Of Recalls Given Their Highly Prejudicial Nature.

In a products liability action, a jury must decide whether the plaintiff was injured by an alleged defect in a specific product. *See Zielinski v. A.P. Green Indus., Inc.*, 2003 WI App 85, ¶ 8, 263 Wis. 2d 294, 661 N.W.2d 491. Consistent with this, courts routinely exclude recall evidence as irrelevant unless there is proof that the product at issue was included in the recall *and* experienced the recall condition. *See, e.g.*, *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 133–34 (6th Cir. 1984); *Vockie v. General Motors Corp*., 66 F.R.D. 57, 61 (E.D. Pa. 1975), *aff'd*, 523 F.2d 1052 (3d Cir. 1976). When recalls are "undeniably not linked to the accident at issue," admitting them "would entirely untether the concept of causation from liability." *Sikkelee v. Precision Airmotive Corp.*, 522 F. Supp. 3d 120, 159 (M.D. Pa. 2021).

Because juries tend to incorrectly infer that a recall itself demonstrates defectiveness or lack of manufacturer concern for safety, it thus falls to the trial court rigorously to police the relevance of the recall evidence. Here, the circuit court failed to do so. It not only admitted evidence of recalls, but it admitted evidence of recalls having nothing to do with the defect asserted in this case, and even allowed evidence of recalls for a company that was not a defendant in the case.

B. Unrelated Recalls Do Not Rebut The Presumption Of Non-Defectiveness

To rebut the presumption of non-defectiveness under § 895.047(3)(b), the plaintiff must put forth evidence that ***the product at issue*** is defective. Recalls of other products—including recalls related to components such as car doors and airbags, and recalls by a company not involved in the case—do not show this. Instead, they confuse the jury into believing there was a defect.

Under § 895.047(3)(b), courts must credit manufacturers' compliance with relevant government standards. But by allowing evidence of recalls relating to irrelevant aspects of this product and other products to "rebut" this presumption, the circuit court here converted the statute into a penalty. Because recalls are a fact of commercial life for major manufacturers, no automotive, pharmaceutical, or medical device defendant could avail itself of the presumption. Instead, any defendant that tried would be subject to open season on unrelated corporate history. The statutory language cannot be read to *sub silentio* approve in all cases the admission of evidence that courts around the country have identified as especially prejudicial and irrelevant.

There is no question that a defendant "will be unfairly prejudiced and the jury confused or mislead if the plaintiff is permitted to parade before the jury evidence of a product recall" unrelated to the product or

defect alleged in a case. *Verzwyvelt v. St. Paul Fire & Marine Ins. Co.*, 175 F. Supp. 2d 881, 888–89 (W.D. La. 2001); *see also Calhoun*, 738 F.2d at 133–34; *Kane v. Ford Motor Co.*, 450 F.2d 315, 316 (3d Cir. 1971).

CONCLUSION

This circuit court's judgment should be reversed.

Dated this 27th day of December, 2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c)3. for a brief. The length of this brief is 2,716 words.

Dated this 27th day of December, 2021.

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