STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

Appeal No. 2020AP001052

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.

RESPONDENTS' BRIEF IN RESPONSE TO NON-PARTY BRIEFS OF ALLIANCE FOR AUTOMOTIVE INNOVATION ("AAI") AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. ("PLAC")

APPEAL FROM THE CIRCUIT COURT OF RACINE COUNTY, CASE NO. 2016CV001096
Honorable Eugene A. Gasiorkiewicz, Presiding

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This appeal involves discretionary evidentiary decisions, not novel legal issues that broadly impact manufacturers. This court adheres to a policy of deciding appeals on the "narrowest possible ground," avoiding misstatements over issues not "squarely presented." *State v. Blalock,* 150 Wis.2d 688, 703, 442 N.W.2d 514 (Ct.App.1989). That alleviates amici's concern here, as the circuit court's rulings were well-reasoned, fact-specific, and supported by the record. The amici's policy concerns are not truly at issue when the record is properly considered.

That PLAC and AAI are disappointed in a large verdict against one of their members does not elevate the significance of the evidentiary analysis. Concern over the size of the verdict is misplaced because Hyundai concedes the damages are commensurate with Vanderventer's horrific injuries. *A.O. Smith v. Allstate Ins.*, 222 Wis.2d 475, 491-92, 588 N.W.2d 285 (Ct.App.1998)(issues not raised on appeal are "deemed abandoned"). The new arguments and issues raised by these non-parties are not supported by the record. This was a meritorious claim proven by credible, reliable evidence.

AAI and PLAC, likely unfamiliar with the lengthy record, ignore all evidence against Hyundai, which is not appropriate. *Zartner v. Scopp,* 28 Wis.2d 205, 209, 137 N.W.2d 107 (1965)(evidence must be viewed in light most favorable to verdict). Affording appropriate deference to the circuit court and this verdict will not deprive manufacturers of any legitimate defense in future cases.

I. THE RECORD ALLEVIATES AAI'S CONCERN THAT THE VERDICT WAS BASED ON SPECULATION.

AAI's paramount concern, that Sazcalski's defect opinion was hypothetical and speculative, is unfounded. His opinion was based on indisputable physical evidence that the head restraint guides created a

fulcrum in Vanderventer's back; medical evidence that the paralyzing fracture was caused by this fulcrum at T6; forensic examination of the vehicle; scientific principles and facts admitted by Hyundai's witnesses; Hyundai's own design documents and witness testimony identifying the defect years before manufacture; testing by Hyundai; Sazcalski's own dynamic testing, finite element analysis, and torsional rigidity study; and rigorous review of all relevant materials. (*See* Resp.Brief, p.25-33,38-45). The court specifically found Saczalski's opinion was "not a subjective belief by unsupported speculation," and "there was more, much more than minimal basis for Saczalski to testify in this matter." (R1765:149-150,R1778:103-104,107-110;AApp.1494-1495;R.App.35-36,39-41.)

A. Under *Daubert*, testing is discretionary; regardless, Sazcalski's opinion was based on testing and was reliable.

AAI advocates for creation of a rule specific to automobile products liability cases where testing the defect is ***always required,*** and the circuit court loses discretion to choose which factors support reliability. No court has adopted such a rule. To the contrary, in automobile products cases, testing is discretionary, ***not required***. *Clark v. Chrysler Corp.*, 310 F.3d 461, 466 (6th Cir.2002), *vacated on other grounds*, 540 U.S. 801 (expert testimony on vehicle defect and causation admissible without "any testing relative to the accident"); *Clay v. Ford Motor Co.*, 215 F.3d 663, 668–69 (6th Cir.2000)(expert's "failure to test his theories went to the weight of his testimony regarding defects…not to its admissibility….[Manufacturer] was able to challenge the testimony…on cross-examination.")[1]

[1] Curiously, AAI relies on Virginia cases while arguing for exclusion of expert testimony that "does not meet reliability standards." (AAI Brief, p.14). Virginia is not a *Daubert* state, and none of those factually distinguishable cases assessed "reliability."

While testing alternative designs is often emphasized (*Dhillon v. Crown Controls*, 269 F.3d 865, 870 (7th Cir.2001),[2] the product's defect is frequently identified by examining the physical evidence. *Jacobs v. Tricam Indus.*, 816 F.Supp.2d 487, 493 (E.D.Mich.2011) ("[T]esting is not required in every case, particularly where, as here, the expert conducted an examination of the physical evidence.")

More importantly, AAI's request to add mandatory testing prerequisites to §§907.02 and 895.047 would usurp the legislature's judgment. *Wagner Mobil v. City of Madison,* 190 Wis.2d 585, 594, 527 N.W.2d 301 (1995) ("[I]t is not the function of this court to usurp the role of the legislature"); *LaCrosse Lutheran Hosp. v. LaCrosse Cty.,* 133 Wis.2d 335, 338, 395 N.W.2d 612 (Ct.App.1986) (Courts "cannot rewrite [statutes] to meet [a party's] desired construction.") AAI's proposal should be directed at the legislature.

The reliability inquiry is flexible and lenient. *Seifert v. Balink,* 2017 WI 2, ¶64, 372 Wis.2d 525, 888 N.W.2d 816. Circuit courts have tremendous discretion "in determining which factors should be considered in assessing reliability, and in applying the reliability standard to determine whether to admit or exclude evidence." *Id.* ¶90. This Court cannot obviate that discretion.

Moreover, AAI's rhetoric ignores the record. ***Saczalski's opinions were based on scientific testing***. (Resp.Brief, p.28-30.) Saczalski relied on Hyundai's own tests proving the existence of this defect. Hyundai's testing showed this defect occurred when the head restraint is loaded, that the defective hollow tube was the "weak link" in the design, and the guides

[2] As recommended, Saczalski directed dynamic testing of the primary alternative design, the "active head restraint," to show it would alleviate the defect by rotating the injurious posts away from the occupant in a rear-end crash. (R179:4,5,8,R1765:146.)

deformed more than the rest of the seat in dynamic testing (creating the injurious fulcrum). (R1763:22,140-147,159-63,R855,R852,R1769:16,R1053:48.) Saczalski also performed mathematical testing of the defect: finite element analysis and torsional rigidity study. (R844-46,R1787:226,262-63,R1493:70,94.) Saczalski did not need to duplicate what Hyundai's testing, the mathematical analysis, and the physical evidence proved.[3]

AAI criticizes admission of a demonstrative exemplar seat fabricated by Saczalski that showed the maximum deformation of the guides. (AAI Brief, p.8-9;R875.) However, ***Hyundai had "no objection" to the admission of that exhibit at trial or here on appeal***. (R1763:18,124,148.) Any arguable error relating to this demonstrative exhibit was waived. *State v. Cameron*, 2016 WI App 54, ¶12, 370 Wis.2d 661, 885 N.W.2d 611 (party must object at trial to preserve appellate issue); *A.O. Smith*, 222 Wis.2d at 491-92; *Adams Outdoor Advert. v. City of Madison*, 2018 WI 70, n.8, 382 Wis.2d 377, 914 N.W.2d 660 (courts decline arguments "raised for the first time in an amicus brief, as…not properly before us.…")(internal citations omitted). The exemplar seat was undisputedly admissible.[4]

Saczalski's reliable methodology leaves no concern over admission of speculative expert testimony.

[3] AAI suggests Saczalski needed to conduct unnecessary crash tests with a dummy to observe the defect causing the injury. Such a test would not have showed the injury because dummies have a steel spine. (Resp.Brief, p.42). An expert cannot ethically test a human under similar conditions to observe the spine fracturing.

[4] Regardless, during deliberations, the jury asked to view the physical evidence from the crash- the subject seat and seat foam- not this demonstrative exhibit. (R1777:37-43.)

B. FMVSS regulations are minimum standards that create a rebuttable presumption of non-defectiveness, not a bar to liability.

Without citing authority, AAI incorrectly argues the verdict should be reversed because Hyundai's testing showed compliance with FMVSS standards. (AAI Brief, p.4-8). That issue is not before this Court as Hyundai did not raise it. Under Wis. Stat. §895.047(3)(b), compliance with standards creates a "rebuttable presumption that the product is not defective." Hyundai argued at trial that it complied with FMVSS 202a[5] (governing certain aspects of head restraints) and 207[6] (seat strength). (*See, e.g.*, R1776:150-151,R1769:124;A.App.1977,3129.) The jury was properly instructed on the presumption but sided with Vanderventer. (R1777:17-19.)

AAI portrays compliance with FMVSS as an ***un-rebuttable*** bar to liability, contrary to §895.047(3)(b). AAI overstates the significance of compliance. These "motor vehicle safety standards" are defined as "minimum standard[s]." 49 U.S.C. §30102(a)(10). Compliance is not a shield from civil liability: "**Common Law Liability**. Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. §30103(e). Congress did not intend for these minimum standards to serve as a defense to products liability suits:

> It is intended…that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract and tort liability**.**

H.R.Rep. No. 1776, 89th Cong.2d Sess. 24 (1966). Hyundai conceded "[t]he Hyundai Defendants are not arguing that their compliance with the

[5] (R378.)
[6] (R379.)

FMVSS exempts them from liability…" (R423:4.) Hyundai's FMVSS expert agreed at trial that complying vehicles can nonetheless be defective:

> Q. You would agree, Mr. Lang, that a car can pass all minimum FMVSS standards and still be found to be defective, right?
> A. Cars that have satisfied every motor vehicle safety standards have been found to be defective, that's true.

(R1770:97.) Hyundai's experts agree that 207's regulation of seat strength has hardly been modified in 53 years, and ***testing shows a cardboard box or lawn chair can pass it***. (R1770:23,R1771:197-98.) ***Hyundai's*** expert admitted "[t]hat's why all the industry far exceeds the standard." (R1771:197-98.)

Perhaps more importantly, neither FMVSS 207 nor 202a[7] specifically govern this defect –the hollow upper seat structure deforming to angle the head restraint guides toward the occupant.[8] Courts have recognized that FMVSS standards are not comprehensive. *Kia Motors v. Ruiz*, 432 S.W.3d 865 (Tex.2014)(holding that FMVSS 208 (airbags) did not govern the defect—the risk of airbags failing to deploy). Hyundai's experts agreed that a properly designed seat should not allow the guides to deform toward the occupant and disrupt the seat's uniform support. (R1770:49,R.1460:1.)

Even though Hyundai identified this defect in an engineering drawing and its own testing (R847,R1053:48), it had no specification to address the problem:

> Q. My question, Mr. Baek, is there is no ES specification that limits the deformation of those guides, correct?
> A. Correct. We don't just look at the angle of the guide pipe.

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[7] Vanderventer also showed at trial that the head restraint did not comply with 202a because it ejected in the crash. (R1763:148-150.)

[8] The defect causing the paralyzing injury was the weak hollow tube structure in the upper seat frame, not the head restraint itself, so 202a was particularly inapplicable to that issue.

(R1768:142.) The jury was right to conclude that neither FMVSS nor Hyundai's specifications adequately addressed this defect.

C. The jury instructions prevented a verdict against Hyundai based on sympathy or "deep-pockets."

AAI's concern with juror sympathy and "deep pockets" is unfounded. Wisconsin courts "assume that a jury follows the instructions given by the trial court." *Ford Motor Co. v. Lyons*, 137 Wis.2d 397, 457, 405 N.W.2d 354 (Ct.App.1987). Here, the jury was properly instructed to disregard sympathy, evaluate witness credibility, and hold Vanderventer to the burden of proof. (R1777:6-8,13-18,20-23,32.)

Further, unlike some states, there is no concern in Wisconsin that juries will treat "deep pockets" defendants as insurers because juries are not told the effect of the verdict and are instructed to answer questions based on the evidence regardless of their answers to other questions. *McGowan v. Story*, 70 Wis.2d 189, 196, 234 N.W.2d 325 (1975);(R1777:20).

II. PLAC'S CONCERN WITH ADMISSION OF THE AD DESIGN IS INCONSISTENT WITH THE RECORD.

There were several bases for admission of Hyundai's "AD" seat design. (Resp.Brief, p.49-55.) Wis. Stat. §895.047(4) permits admission of subsequent remedial measures to "show a reasonable alternative design that existed at the time when the product was sold."

PLAC asks this Court to add a requirement to §895.047(4) that the design was "in-production" when the defective product was sold. Section 895.047(4) only requires a "design that existed." §895.047(4). ***Even Hyundai disagrees with PLAC,*** asserting that §895.047(4) only requires a "preliminary sketch or outline showing the main features." (App.Brief, p.61). Adding a requirement that the design be "in-production" is the legislature's prerogative, not this Court's.

Regardless, PLAC's concern that the AD design was merely a "conceptual in-research design...not yet implemented" is contrary to the record. The "AD" design was ***fully rendered, optimized, manufactured, and sold in the same vehicle seven years before the Vanderventer's vehicle was sold***. (Resp.Brief, p.49-51;R1763:23-24,R873,R884,R1768:77,R1294:1-2,R1295:11-13,R1531:31;A.App.1774;R.App.118-119). Hyundai's own documents and witness testimony showed that the ***identical*** design was extensively analyzed, tested, completed, and ***selected as Hyundai's optimal seat design*** in 2007. (Resp.Brief, p.49-50;R1768:77-79,R1294:1-2,R1295:11-13,R1531:31,R1778:117-120,132-35;A.App.1774.) Hyundai's counsel conceded that its exhibit showed the 2007 optimized design was the 2017 AD. (R1778:135.)

More importantly, Hyundai ***manufactured and sold*** a seat in 2007 ("HD Canada;" R873), which was the same design as the 2017 AD. (R1763:23-24, R884;R.App.118-119.) This 2007 seat was not merely "similar" to the AD, expert testimony established it was the "same…design" in the defective upper seat structure. (R1763:24). When this issue was argued, Hyundai did not dispute that the 2007 "HD Canada" design was "virtually identical, technically the same design" as the 2017 AD. (R1787:168). Any concern that the AD design was not "in-production" or production-ready is alleviated by the record.

PLAC's concern that the AD design should not have been admitted under §904.07 to show "feasibility of precautionary measures" and for "impeachment" is similarly unsupported. PLAC's claim that "feasibility" was uncontested is incorrect. Hyundai was given the opportunity to concede that issue at trial when it first sought to exclude the AD design, and Hyundai ***did not***. (R1787:163-166;A.App.3356-3359;Resp.Brief., p.52.) Hyundai challenged every aspect of Vanderventer's proof

throughout and after trial, including sufficiency of the negligence and alternative design evidence. (R1450:2-3.)

With respect to "impeachment," this Court must follow *D.L. v. Huebner*, 110 Wis.2d 581, 601, 607-08, 329 N.W.2d 890 (1983), which held the circuit court has discretion to adopt a "broad view of the impeachment exception" where the evidence "impeach[es] the theory of…defense that [the product] was safe as designed..." *Huebner* weighed the arguments made by PLAC based on authorities from other jurisdictions and left the matter to the circuit court's discretion. *Id.*

Regardless, the AD was not admitted to prove Hyundai's negligence, it was used for impeachment of defense arguments and witnesses as §904.07 allows (whether broadly construed or not), and Hyundai failed to ask for a limiting instruction. (Resp.Brief, p.52-53;R1778:119;R.App.42.) In addition, Hyundai used the AD design for its own defense, which Vanderventer, in fairness, was entitled to rebut. (Resp.Brief, p.51,55.)

PLAC's claim that the AD was "devastating" for Hyundai is contrary to the record as ***Hyundai informed the jury in opening it discontinued the subject seat for the AD after this crash***. (R660,R1761:107-08). In addition, the AD was ***only one of seven alternative design seats*** Vanderventer introduced that Hyundai and other manufacturers used since 1998, none of which contained the defective hollow tube design of the subject seat. (Resp.Brief, p.55;R1763:14-18,22-25,33-35). The primary alternative design advanced by Vanderventer was Hyundai's active head restraint, "HD" design (used from 2006-2010), not the AD. (R1787:257-260,R871,R881,R606.) The jury understood that Hyundai could have manufactured seats without the defect regardless of the AD. PLAC's concerns are unfounded.

III. PLAC'S AUTHORITY SUPPORTS THE CIRCUIT COURT'S "GREAT DISCRETION" IN ADMITTING RECALL EVIDENCE.

PLAC's arguments regarding recalls ignores their limited evidentiary purpose. The jury was told only that recalls pre-dating this accident occurred without introducing specific facts related to each. (R1766:9-13.) Recalls were not offered to establish negligence or defect, but only to rebut §895.047(3)(b)'s presumption of non-defectiveness—to demonstrate vehicles complying with FMVSS' minimum standards can nonetheless be defective. (1757:148;A.App.951.) Hyundai argued that FMVSS standards are "quite stringent," and that compliance proved its "seat in this case is not defective." (R1776:150-151,R1769:124;A.App.1977,3129.) However, these vehicles that initially complied with FMVSS were recalled because there was nonetheless a "defect in the vehicle" relating to "motor vehicle safety." *Manieri v. Volkswagenwerk*, 376 A.2d 1317, 1323-24 (N.J.App.Div.1977). This evidence showed that vehicles initially complying with FMVSS can still be defective—directly rebutting the arguments Hyundai made.

PLAC also omits that this issue is non-dispositive. Recall evidence was admitted only to rebut the presumption under §895.047(3)(b), not the negligence claim where Vanderventer also prevailed. (R1757:81,R1485:2;A.App.884.) As such, it does not affect the judgment. It was also forfeited because Hyundai failed to request a limiting instruction. *State v. Hoffman*, 106 Wis.2d 185, 222, 316 N.W.2d 143 (Ct.App.1982);(Resp.Brief., p.45-46.) Any concern that the jury could have been "misled" into using the recalls generally as evidence of negligence or defect is not supported by the record and should have been remedied by a limiting instruction that Hyundai failed to request.

PLAC's authority agrees that the court had "great discretion" in admitting recall evidence. *Kane v. Ford Motor Co.*, 450 F.2d 315, 316 (3d Cir.1971). Here, the court properly exercised that discretion in rejecting Hyundai's arguments under §§904.01 and 904.03 and finding the limited recall evidence relevant to rebut §895.047(3)(b)'s presumption. (R1757:147-148;R1778:125;R.App.17-18,44.) The court observed that the recalls show that a manufacturer cannot rely on FMVSS "minimum standards…to be a general safety threshold for all aspects of the car." (*Id*.)

The legislature made §895.047(3)(b)'s presumption "rebuttable," and did not limit the type of rebuttal evidence available. Section 903.01 broadly permits the rebutting party to introduce evidence showing "the nonexistence of the presumed fact is more probable than its existence." Little could be more probative of "the nonexistence of the presumed fact" (compliance with FMVSS renders vehicles non-defective) than safety-related "defects" requiring recall in vehicles passing those standards. There is no support for PLAC's contention that this evidence penalized Hyundai; rather it helped place these minimum standards in appropriate context and afforded Vanderventer a fair opportunity to rebut the presumption.

PLAC advocates for creation of a blanket rule prohibiting introduction of recall evidence that the legislature chose not to include in §§895.047 or 903.01. PLAC's authority does not support its arguments. For example, *Calhoun v. Honda Motor Co.*, did not hold that recall evidence is only admissible where the same product and defect is present. 738 F.2d 126, 134 (6th Cir.1984). Instead, it states "dangers inherent in recall evidence are small and the introduction of a recall letter does not constitute reversible error." *Id*. PLAC also relies on a summarily-affirmed district court case disagreed with by the 8th Circuit. *Compare Farner v. Paccar, Inc.*, 562 F.2d 518, 527 (8th Cir.1977) *with* *Vockie v. General Motors*, 66 F.R.D. 57, 61 (E.D.Pa.) *summarily aff'd*

(1975). The Eighth Circuit held that recall evidence was not unfairly prejudicial, and its admission is "committed to the discretion of the trial court." *Id*. No case cited by PLAC deals with use of recall evidence to rebut a presumption of non-defectiveness, while Vanderventer cited several cases supporting such use. (Resp.Brief, p.47-48.) Admission of recall evidence was a matter for the court's discretion. There is no basis for reversal.

Respectfully submitted this 7th day of January, 2022.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,998 words.

Dated this 7th day of January, 2022.

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