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COURT OF APPEALS

No. 2020-AP-1052

In the 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

REPLY BRIEF OF DEFENDANTS-APPELLANTS HYUNDAI MOTOR AMERICA AND HYUNDAI MOTOR COMPANY

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ARGUMENT

I. This Court should reverse and order that the jury's answers be changed because Plaintiffs failed to offer admissible expert evidence on key elements of their claims.

Plaintiffs do not dispute that they had the burden to present reliable expert evidence of product defect/negligent design and specific medical causation. Instead, they ask this Court to interpret the circuit court's *Daubert* gatekeeping duties to be so lax as to be meaningless. And rather than meet Hyundai's arguments head-on, Plaintiffs wrap themselves in the circuit court's erroneous rulings and present a distorted—and oftentimes incorrect—picture of the record. Hyundai urges the Court to compare the actual record to how Plaintiffs describe it.

A. Plaintiffs failed to present admissible expert evidence of product defect/negligent design.

Plaintiffs offer no answer to the circuit court's legal error in failing to undertake the requisite reliability analysis of Saczalski's novel opinion on product defect/negligent design. Instead, Plaintiffs repeat the circuit court's mistake, conflating Saczalski's qualifications with the reliability of his specific expert opinion. The circuit court's conclusory statements about reliability do not suffice under Wisconsin law, especially without any mention of indicia of reliability. *See* Blue Br.28-31.

In any event, the circuit court could not have reasonably concluded that Saczalski's product defect/negligent design opinion was reliable. Plaintiffs ignore the gaping reliability hole—the lack of testing of the seat in question. Plaintiffs ignore the extensive case law cited by Hyundai establishing that testing is essential with a novel theory. Blue Br.31-34. Testing to determine whether Saczalski's theory is correct was necessary here because neither the testing of this seat by Hyundai and other manufacturers nor the real-world experience of hundreds of thousands of cars with this type of seat ever indicated that Saczalski's theory had any validity. Saczalski even conceded that his standard practice is to test his theories. Indeed, Saczalski's own testing disproved his first hypothesis for how the injury occurred (*i.e.*, that the rear passenger's knees pushed into Vanderventer's seat), yet he intentionally elected not to undertake any confirmatory testing for his second theory. R.1787:187,190-91,237;A-App.3380,3383-84,3430. An expert cannot disprove one hypothesis through testing, invent a new one, and have it deemed reliable because he elected not to subject it to the scientific method. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993) ("Scientific methodology

today is based on generating hypotheses and testing them to see if they can be falsified….").

To concoct some reliable basis for Saczalski's novel theory in the absence of relevant testing, Plaintiffs make assertions unsupported by the record, including the following:

- Insisting that Saczalski's prong theory was not novel, Plaintiffs point to an alleged Hyundai "engineering drawing" to assert that the precise defect had been identified. Red Br.9,20,29. Plaintiffs cite a cropped photograph of a notebook sketch with highlights added by Plaintiffs' counsel. Hyundai's engineer testified, however, that the drawing was a sketch of an active head restraint, not the headrest in the case. R.1016:19-20. And he testified that the sketch depicted what would happen if the seat were pushed with a hand, not a crash situation. *Id.* Moreover, Saczalski conceded that he had never seen nor heard of his prong theory before this case. R.1763:217;A-App.3684.
- Plaintiffs misleadingly claim that one of Hyundai's tests "showed *th*[*e*] *exact defect occurring*, with the posts

deforming toward the occupant when the head restraint was loaded." Red Br.30. But that constant-volume-strength test is inapposite. *First*, it was conducted on a prototype, not Vanderventer's headrest. R.1765:106-07;A-App.1451-52. *Second*, the prototype had an extra locking notch, which even Saczalski conceded caused different results than if the test had been conducted on Vanderventer's headrest. R.1765:107;A-App.1452. *Third*, the tested headrest was not in the same position that Saczalski said Vanderventer's was in at the time of the crash. R.1765:84;1771:131;A-App.1429,2411. *Fourth*, the test did not mimic a rear-end crash. Instead, the test slowly applied and released pressure on the headrest. R.1763:143-44;A-App.3610-11. *Finally*, the test does not show the bottom of the prongs, so there is no evidence that the prong ends deformed toward the occupant. R.1763:142;R.1765:62-63;A-App.1407-08,3609. Instead, the test shows the prongs bending *above* the crossbar. R.1771:133-34;A-App.2413-14. Ultimately, a picture—or in this case a video—is worth a thousand words. The Court need

only watch the video to see the quantum leap Saczalski took in using this test to determine the purported maximum intrusion of the prongs. R.1030.

- Plaintiffs do not dispute that the finite-element analysis is limited to showing whether the crossbar in question could have been made stronger. Red Br.29.[1] And the fact that one crossbar could have been made stronger does not mean the seat was defective. Plaintiffs do not dispute that point either. Red Br.29.
- Plaintiffs say that Saczalski "facilitated and performed extensive additional testing and performed additional work—including the Quebec sled testing, competitor seat comparisons, and seat headrest analyses…." Red Br.30. But Saczalski conceded that he had virtually no involvement with the Quebec testing, and he performed zero testing on the

[1] Plaintiffs' forfeiture argument is frivolous. Red Br.29 n.10. The finite-element analysis considered the crossbar in isolation, R.1765:61-62,93-94;A-App.1406-07,1438-39, and Hyundai challenged that analysis's reliability. R.1489:40-41;R.1765:144;A-App.409-10,1489.

actual seat and headrest at issue. R.1765:68-71;R.1763:241;A-App.1413-16,3708.

- Plaintiffs say that "Saczalski modeled an exemplar spine to anatomically confirm the fulcrum was near the level of Vanderventer's injuries." Red Br.27. But Saczalski conceded that the spinal overlay was a "generic skeleton," not an anatomical representation of Vanderventer. R.1763:226-27;A-App.3693-94.
- Plaintiffs claim that "[s]led-testing Hyundai's 'active head restraint' design showed the posts moving *rearward* in a rear crash." Red Br.30. But to support that proclamation (which involves a different type of headrest than Vanderventer's), Plaintiffs merely cite their own attorney's argument. R.1765:145-46;A-App.1490-91.
- Plaintiffs claim that a Hyundai "expert conceded that as Vanderventer loaded the seat, applying force to the upper seat structure and head restraint, the weak hollow tube crushed, bent, and buckled, allowing the posts to rotate toward his back." Red Br.18. But Plaintiffs cited their own expert's

testimony for that proposition. *Id*. (citing R.1763:185-86;A-App.3652-53). Hyundai's expert testified that tube performed properly and as designed. R.1771:29,105;A-App.2385.

- Plaintiffs repeatedly state that the prongs permanently rotated forward twenty degrees, but they do not mention that the net effect of that was for the prongs to be nearly flush with the seat. R.1765:103;A-App.1448.
- Plaintiffs say that one of Hyundai's experts "admitted that allowing the posts to rotate toward the occupant would be a 'pretty stupid design.'" Red Br.21. But Plaintiffs misleadingly fail to note that Dr. Viano was asked about a "hypothetical design" nothing like the design at issue here. R.1460:1.

After presenting this misstatement tour-de-force to bolster Saczalski's untested opinion, Plaintiffs then leap to the conclusion that "Hyundai's quibbles with the minutiae of tests" are "fodder for cross-examination, not for exclusion." Red Br.31. But Plaintiffs cite no authority that inapposite tests can provide sufficient cover to deem an expert's novel theory reliable. On the contrary, "the courtroom is not the place for

scientific guesswork, even of the most inspired sort. Law lags science; it does not lead it." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996). And courts have repeatedly rejected the old canard that cross-examination is sufficient to root out unreliable expert testimony. *See, e.g.*, *United States v. Valencia-Lopez*, 971 F.3d 891, 899 (9th Cir. 2020); *Nease v. Ford Motor Co.*, 848 F.3d 219, 231 (4th Cir. 2017). The circuit court's *Daubert* gatekeeping role is to prevent unreliable junk science from reaching the jury, not to let it all in for the jury to sort out.

B. Plaintiffs presented inadmissible expert evidence of specific causation.

1. Kurpad gave improper biomechanical testimony.

Plaintiffs make two fundamental mistakes in their defense of Kurpad's biomechanical causation testimony. *First*, like the circuit court, Plaintiffs globally assess Kurpad's ability to offer his expert opinions. But just because Kurpad could testify about his surgical observations and medical experience does not mean he could stray into opinions on biomechanics, for which he is unqualified. *Daubert* requires examining each discrete area about which an expert wants to opine. *Dura Auto. Sys. of Ind. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002). The circuit court

erred as a matter of law in failing to evaluate the admissibility of Kurpad's specific biomechanical testimony under *Daubert*.

Second, Plaintiffs are wrong in contending that Kurpad only relied on Saczalski's biomechanical opinions and did not independently offer such opinions. In fact, Kurpad offered his *own* opinions on those topics. Blue Br.43. Plaintiffs try to dismiss this improper testimony as "[a]t best . . . a few isolated responses out-of-context" that merely repeated what Saczalski said. Red Br.43. That cannot save the day. An expert qualified in one field cannot bolster the credibility of another expert in another field by offering that expert's opinion as his own. That is, "[a] scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty." *Dura Auto.*, 285 F.3d at 614. Not even Plaintiffs seriously contend that Kurpad could reliably opine on biomechanical issues, but that is what Kurpad did.

2. Saczalski offered improper medical causation testimony.

Plaintiffs' argument about Saczalski's improper medical causation testimony proves the circuit court's error in allowing it. Plaintiffs' cited case *Pike v. Premier Transp. & Warehousing*, No. 13 CV 8835, 2016 WL 6599940 (N.D. Ill. Nov. 8, 2016), confirms that a biomechanical engineer is

"not qualified to diagnose injuries." *Id.* at *3. Although Plaintiffs contend that Saczalski only offered biomechanical opinions, that is not true—he unequivocally testified that the prongs caused Vanderventer's paralysis despite admitting he was unqualified to offer medical opinions. Blue Br.50-51. The circuit court plainly erred in allowing him to offer a medical causation opinion.

II. Alternatively, this Court should order a new trial due to improper and prejudicial evidence.

Plaintiffs cannot escape the circuit court's improper admission of evidence of unrelated recalls, a subsequent remedial measure, or Saczalski's key undisclosed opinions. And, on the question of the prejudicial effect of that inadmissible evidence, Plaintiffs misstate who has the burden and what the standard is. Red Br.22-23. The prevailing party—"as the beneficiary of the error"—must show that the error was harmless. *Jones v. State*, 226 Wis.2d 565, ¶ 63, 594 N.W.2d 738 (1999). The test is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Hannemann v. Boyson*, 2005 WI 94, ¶ 57, 282 Wis.2d 664, 698 N.W.2d 714 (citation omitted). Plaintiffs

come nowhere close to satisfying that standard. Hyundai stands on its discussion of prejudice in its opening brief.

Furthermore, Plaintiffs' repeated assertions that Hyundai forfeited its new-trial arguments by not requesting limiting instructions are a red herring. When evidence should be excluded entirely, a limiting instruction does not magically make it admissible, even for a limited purpose. And there is no dispute that Hyundai timely objected to the admission of recall and subsequent-remedial-measure evidence.

A. Evidence of 85 unrelated recalls should not have been admitted.

Plaintiffs' arguments about evidence of 85 recalls involving different vehicles and different components spanning decades misinterprets the relevant statutes. Section 895.047(3)(b) states, "[e]vidence 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." (emphasis added). Section 903.01 in turn states that a statutory presumption imposes upon the adverse party "the burden of proving that the nonexistence of **the presumed fact** is more probable than

its existence." (emphasis added). In this case, the presumed fact is that the seat in the 2013 Elantra is not defective.

Plaintiffs, however, incorrectly contend that the presumed fact was that "vehicles complying with FMVSS' minimum standards" are not defective. Red Br.46. But the statute cannot be stretched that far—"the product" at issue here was not any component of any Hyundai (or other manufacturer's) vehicle produced over a three-decade period. If Plaintiffs' overbroad view of the meaning of "product" were correct, the statutory presumption would become largely meaningless: any recall ever of a manufacturer's various models would rebut it.

The admitted evidence here proves the point. The circuit court allowed evidence that included five recalls of the **1986 Hyundai Excel** involving brakes, speed control, emissions, and the transmission. R.1174:6-10;A-App.114-18. Not *one* of the 85 recalls admitted into evidence involved an Elantra's seat, let alone one in the 2013 Elantra. Not only did that recall evidence violate the statutes, but its prejudicial effect unquestionably exceeded any probative value.

In their zeal to justify this egregious evidentiary error, Plaintiffs state that "the recall evidence was stringently limited to pre-2013 safety-related

recalls." Red Br.47. That is false. The circuit court admitted evidence of seven recalls involving the 2015 Sonata, 2014 Santa Fe, 2015 Accent, and 2015 Genesis. R.1175:52,58,60,72,76,80,82; A.App.277,283,285,297,301,305,307. Even Plaintiffs recognize that introducing evidence of post-2013 recalls was impermissible. But they did it anyway.

Finally, Plaintiffs make the astounding assertion that Hyundai invited the circuit court's error by pursuing the statutory presumption. Red Br.48. In other words, Plaintiffs contend that Hyundai opened the door to the circuit court's admission of improper rebuttal evidence by availing itself of the statutory presumption. Not surprisingly, Plaintiffs cite no legal authority for that radical argument.

B. Subsequent-remedial-measure evidence should not have been admitted.

1. The evidence was inadmissible under Section 904.07.

Plaintiffs erroneously argue that the circuit court properly admitted the subsequent-remedial-measure evidence about the 2017 AD seat under two narrow exceptions in Section 904.07. *First*, Plaintiffs simply ignore the Wisconsin cases cited by Hyundai establishing that the impeachment exception does not allow use of subsequent-remedial-measures evidence to

impeach a defendant's case generally. Blue Br.59. Plaintiffs do not deny that they used the 2017 seat to impeach the theory of Hyundai's case. Indeed, Plaintiffs admit that the seat was used to impeach Hyundai because "Hyundai claimed it was not negligent because of its safety design practices." Red Br.52. Moreover, although Plaintiffs contend that they used the 2017 seat to impeach Hyundai witnesses, none of Plaintiffs' examples and record citations supports that assertion.

Second, Plaintiffs incorrectly rely on the statute's feasibility-of-design exception. That exception only applies if feasibility is controverted. Wis. Stat. § 904.07. Plaintiffs say that "[e]ven after trial, Hyundai argued that Vanderventer failed to meet his burden as to alternative design." Red Br.52. Plaintiffs, however, conflate "feasibility" with "reasonable alternative design." In Hyundai's directed-verdict motion, Hyundai argued that Plaintiffs failed to introduce evidence that a "reasonable alternative design would have 'reduced or avoided' the injury." R.1450:3-5;A-App.341-43. Hyundai never argued that the 2017 seat design was not feasible—instead, Hyundai stated that "feasibility of the supposed alternative design [wa]s not 'controverted.'" R.640:3;A-App.63. In short, feasibility was uncontested, so that exception does not apply.

2. The evidence was inadmissible under Section 895.047.

Plaintiffs also incorrectly argue that evidence of the 2017 seat could be admitted under Section 895.047 to show a reasonable alternative design. Plaintiffs inaccurately claim that "Saczalski testified, without dispute, that the AD design was the same 'unibody' (one piece) design that Hyundai manufactured and sold in the Elantra in Canada in 2007." Red Br.49. Actually, Saczalski merely testified that the 2017 seat appeared ***similar*** to the 2007 seat. R.1763:23-24;A-App.3490. That's like saying an iPhone is the same as an Android because the phones look similar. Mere similarity does not establish that the 2017 seat "existed at the time when the [2013 Elantra] was sold." Wis. Stat. § 895.047(4). Lacking testimony that the 2017 seat existed in 2013, Plaintiffs point to pictures from a 2007 concept and a 2017 seat and ask the Court to deem the designs the same. Red Br.50-51. But even ignoring that the pictures do not show the seats to be the same, the documents Plaintiffs point to are from Hyundai's common-seat-optimization project, R.1531:31, and no testimony established that the 2017 seat was derived from that project. Instead, the record shows that the

2017 seat was developed in 2015, R.907:55, using concepts from the second-generation common frame, R.906:76.

Plaintiffs claim that Hyundai opened the door to the otherwise inadmissible subsequent-remedial-measure evidence by referring in passing to the IIHS rating of three generations of Elantra seats during opening statements. Red Br.53-55; R.1761:107;A-App.1081. But the circuit court's rejection of that baseless argument went unchallenged on appeal. R.1787:168;A-App.3361. Plaintiffs also erroneously say that Hyundai opened the door by referencing its 2007 seat-optimization project. Red Br.54-55. But as discussed, the 2017 seat was not derived from that project.

C. Saczalski's undisclosed opinions should have been excluded.

Section 804.01(2)(d) entitled Hyundai to pretrial disclosure of "facts known and opinions held by experts." Wis. Stat. § 804.01(2)(d). Plaintiffs do not dispute that Saczalski never made a pretrial disclosure of the prongs' maximum elastic deformation, even though that is central to Saczalski's opinion. Indeed, Saczalski welded together an exemplar seat to demonstrate this key undisclosed opinion. R.1765:103-05;A-App.1448-50. Trying to escape this violation of the disclosure statute, Plaintiffs contend

that because Saczalski gave deposition testimony about some unquantified elastic deformation, Hyundai "should have anticipated" that Saczalski would concoct a precise figure for the deformation at trial.

Plaintiffs' argument would eviscerate the pretrial-disclosure requirement's protections. Even on a critical issue, an expert could wait until trial to spring his opinion and how he reached it on the opposing party, leaving no meaningful time to prepare for cross-examination.

Plaintiffs' suggestion that Hyundai could not have been prejudiced because Saczalski based his testimony on Hyundai's constant-volume-strength test is laughable. As explained above, that test is not designed to determine elastic deformation in a crash situation, so Hyundai could not possibly have anticipated that Saczalski would try to use it for that purpose.

D. A new trial must include liability and damages.

Plaintiffs do not contest that a new trial must include liability and damages issues.

CONCLUSION

For the reasons stated in Hyundai's opening brief and in this reply brief, this Court should reverse and order that the jury's answers be changed, or, alternatively, order a new trial on liability and damages.

Dated this 7th day of January 2022.

Respectfully submitted,

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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) for a brief produced with a proportional serif font. The length of this brief is 2,993 words.

Dated this 7th day of January 2022.

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