No. 2020AP1052

In the Supreme Court of Wisconsin

EDWARD A. VANDERVENTER, JR., AND SUSAN J. VANDERVENTER,
Plaintiffs-Respondents,

v.

HYUNDAI MOTOR AMERICA AND HYUNDAI MOTOR COMPANY,
Defendants-Appellants-Petitioners,

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

On Appeal from the Racine County Circuit Court,
the Honorable Eugene A. Gasiorkiewicz, Presiding.
Case No. 2016CV001096

PETITION FOR REVIEW

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INTRODUCTION

Eleven years ago, Wisconsin adopted the historic Omnibus Tort Reform Act, 2011 Wis. Act 2. Intended to show the world that "Wisconsin is open for business," the legislation made drastic changes to our State's civil-justice system.[1] Many related to the admissibility of evidence. One section, for example, created a rebuttable presumption that products complying with government safety standards are not defective. Another strictly limited when plaintiffs may introduce evidence of a manufacturer's "subsequent remedial measures." Yet another provision "tightened the standard of admissibility of expert opinion testimony" by codifying the federal *Daubert* rule, strengthening "the gatekeeping function of the trial court." *Seifert v. Balink*, 2017 WI 2, ¶ 170, 372 Wis. 2d 525, 888 N.W.2d 816 (Ziegler, J., concurring). The days of reflexively plaintiff-friendly evidentiary rules, which had put Wisconsin badly out of step with its competitor states, "[were] over." *Id.*

The court of appeals' published decision in this case threatens to turn the clock back to 2010. It does this by removing Act 2's guardrails, interpreting its provisions in a way that strips them of their efficacy. On the issue of the presumption arising from compliance with safety regulations, the decision below punishes a manufacturer who invokes the presumption by opening it up to evidence of *unrelated* problems with *different* products stretching

[1] Memorandum from the Wisconsin Civil Justice Council, Inc. to the Senate Committee on Judiciary, Utilities, Commerce, and Government Operations and Assembly Committee on Judiciary and Ethics (Jan. 11, 2011), *available at* https://www.wisciviljusticecouncil.org/wwcms/wp-content/uploads/2011/01/wcjc_11Jan11-memo-support-civil-justice-reform.pdf.

back decades. The decision also holds that the "reasonable alternative design" exception to the bar on subsequent-remedial-measures evidence permits a plaintiff to introduce merely theoretical concepts to show that, in hindsight, a manufacturer *could* have (and so *should* have) opted for a safer design. Never mind that the statute requires any such design to have "existed at the time the product was sold." Compounding this error, the court endorsed use of subsequent-remedial-measures evidence to "impeach" testimony that a witness has not even given but *might* give later, despite this Court's precedent forbidding that practice. Finally, reflecting a fundamental misunderstanding of *Daubert*'s principles, the opinion below gives trial judges *carte blanche* to admit "expert" testimony solely in light of the witness's *overall* expertise (a throwback to pre-2011 doctrine) and relieves judges of their duty to undertake an opinion-by-opinion assessment of reliability.

It is high time that this Court comprehensively address the proper interpretation and application of Act 2's key provisions. And this case—which is being closely followed around the country—presents an ideal "opportunity to clarify [the Act's] standards." *Seifert*, 2017 WI 2, ¶ 258 (Kelly, J., dissenting).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. When a party triggers the presumption under Wis. Stat. § 895.047(3)(b) that a product is not defective because it complies with "relevant standards, conditions or specifications adopted or approved by a federal or state law or agency," is evidence of recalls

of *other* allegedly defective products admissible when offered to rebut the presumption?

The circuit court answered yes.

The court of appeals answered yes.

2. Does a mere conceptual theory of how a product could have been designed qualify as a "reasonable alternative design [that] existed at the time when the product was sold" within the meaning of Wis. Stat. § 895.047(4), thereby allowing admission of evidence of subsequent remedial measures?

The circuit court answered yes.

The court of appeals answered yes.

3. Does Wis. Stat. § 904.07 allow a party to introduce evidence of subsequent remedial measures to impeach a witness who has not yet testified?

The circuit court did not address.

The court of appeals answered yes.

4. In determining whether an expert opinion satisfies the *Daubert* standard in Wis. Stat. § 907.02(1), can a court rely on an expert's general level of expertise without considering the admissibility of each separate opinion offered by the expert?

The circuit court answered yes.

The court of appeals answered yes.

5. When a witness with general expertise in a subject matter offers a novel scientific opinion that is capable of being tested, can the opinion qualify as "the product of reliable principles and methods" under the *Daubert* standard in Wis. Stat. § 907.02(1) if the theory has not been tested?

The circuit court answered yes.

The court of appeals answered yes.[2]

CRITERIA FOR REVIEW

Each of the five issues presented independently warrants this Court's review of the court of appeals' published decision.

In permitting evidence of 85 recalls of different products to rebut the presumption under Wis. Stat. § 895.047(3)(b), the court of appeals held that it was not bound by Wis. Stat. § 903.01, which permits only evidence that rebuts the "presumed fact"—here, the fact that the subject automobile's seat was not defective. This error of law is now binding precedent in Wisconsin, and only this Court can correct it. *See* Wis. Stat. § 752.41(2); *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). In addition, the application of § 903.01 to the specific presumption in § 895.047(3)(b) has never been addressed by a Wisconsin appellate court prior to this case. So a decision by this Court "would help develop . . . the law." Wis. Stat. § 809.62(1r)(c).

The court of appeals' misinterpretations of the subsequent-remedial-measures statutes also warrant review. In determining the meaning of Wis. Stat. § 895.047(4), the court of appeals relied on another of its decisions construing the term "reasonable alternative design" in Wis. Stat. § 895.047*(1)*. But the court here ignored critical qualifying language appearing only in Section 895.047*(4)*, requiring the reasonable alternative design to have "existed at the time when the product was sold." Misapplying *State*

[2] The lower courts' incorrect answers to these five questions were also prejudicial and not harmless, as Hyundai's merits briefing will explain.

ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110, the court gave the differing language in the two sections the same meaning, thereby construing the additional language in § 895.047(4) to be mere surplusage. This error of law, too, is now binding precedent. Wis. Stat. § 752.41(2). This Court's review is therefore warranted. *See, e.g.,* Wis. Stat. § 809.62(1r)(c); *Nowell v. City of Wausau*, 2013 WI 88, 351 Wis. 2d 1, 838 N.W.2d 852 (granting review to answer de novo a question of interpretation and holding that court of appeals misapplied *Kalal*). More, the question of when a subsequent remedial measure can be introduced to establish the existence of a reasonable alternative design under § 895.047(4) has never been addressed by a Wisconsin appellate court prior to this case, so review will assist in developing and clarifying this important issue of evidence law, which comes up frequently. *See* Wis. Stat. § 809.62(1r)(c).

This Court should also review the court of appeals' ruling concerning the use of subsequent-remedial-measures evidence for impeachment under § 904.07. The court held that a party can introduce such evidence for purposes of anticipatory impeachment, meaning impeachment of testimony that has not (and may never) be introduced. That ruling conflicts with this Court's holding that a party cannot impeach testimony that has not yet been given. *See Voith v. Buser*, 83 Wis. 2d 540, 544, 266 N.W.2d 304 (1978). This Court's review is needed to resolve that conflict of authority. Wis. Stat. § 809.62(1r)(d).

The issues presented concerning the application of the *Daubert* standard under § 907.02(1) also warrant review because

this area of law needs development and clarification. Wis. Stat. § 809.62(1r)(c). Since the enactment of the *Daubert* standard in 2011, there has been only one opinion from this Court concerning that standard that resulted in a precedential decision, *see In re Commitment of Jones*, 2018 WI 44, 381 Wis. 2d 284, 911 N.W.2d 97, and that case discusses *Daubert* at only a very high level of generality. In light of the dearth of *Daubert* guidance from this Court, review is warranted because "[t]he case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation," and "[t]he questions presented [are] not factual in nature, but rather [are] question[s] of law of a type that [are] likely to recur unless resolved by [this] Court." Wis. Stat. § 809.62(1r)(c)(1) & (3).

STATEMENT OF THE CASE

A. Nature of the case

The petition arises from a judgment against Hyundai Motor America and Hyundai Motor Company (collectively, "Hyundai") on Plaintiffs Edward and Susan Vanderventer's strict-liability and negligent-design claims. *See* Dkt. 29. Plaintiffs based their claims on a novel theory concerning how prongs in the headrest of Plaintiffs' 2013 Hyundai Elantra (the "Elantra") caused Mr. Vanderventer's broken spine in a vehicle collision. R.1761:26; R.1763:217.

A jury found Hyundai liable on Plaintiffs' claims and awarded damages of more than $38 million. *See* R.1485. The jury apportioned 84% of the damages to Hyundai and 16% to a teenage driver who had struck the rear of the Elantra and had settled

before trial. *See id.* The circuit court entered judgment against Hyundai in an amount over $32 million. R.1589.

B. Plaintiffs' expert presents a product-defect theory

Plaintiffs' primary expert on the defect issue, a biomechanical engineer named Saczalski, created a novel theory regarding the headrest prongs for the purpose of this litigation. Initially, he postulated that the knees of a rear-seat passenger moved forward into Mr. Vanderventer's seat during the crash, resulting in Mr. Vanderventer's injury. R.1787:187, 237. But when Saczalski tested that theory, the tests disproved it. *See* R.1787:190–91. Saczalski then came up with the theory that the prongs in the headrest of the driver's seat rotated forward to create a fulcrum that resulted in Mr. Vanderventer's broken spine. R.1787:191–92. Saczalski conceded that his headrest-prongs theory was entirely novel, that he had not seen "another case where the poles of the headrest were an injury-producing mechanism," and had "never [ ] seen or heard of an occupant receiving a thoracic spinal fracture in a rear-end crash as a result of posts or poles of the head restraint." R.1763:217. And although Saczalski acknowledged that this second theory could have been tested, this time Saczalski did not perform a confirmatory test. *See* R.1787:241; R.1765:66.

C. The circuit court admits prejudicial evidence

The circuit court issued key evidentiary rulings during trial, permitting Plaintiffs to introduce prejudicial evidence against Hyundai in a manner that did not conform to controlling law.

1. Evidence of unrelated recalls

Wisconsin Statute § 895.047(3)(b) establishes a "rebuttable presumption" that a product at issue "is not defective" if the product complies with "relevant standards, conditions or specifications adopted or approved by a federal or state law or agency." Wis. Stat. § 903.01 states that once the basis for a statutory presumption is established, the burden shifts to the party against whom it is directed to "prov[e] that the nonexistence of the presumed fact is more probable than its existence."

Here, Hyundai presented evidence that the Elantra's seat complied with the applicable federal safety standards. R.1769:146–50. Purportedly to rebut the presumption raised by this showing, the circuit court took judicial notice of 85 voluntary product recalls over 30 years unrelated to the Elantra's driver's seat. R.1757:142–51; R.1766:9–11; R.1767:19–20, 65, 84; R.1174; R.1175; P.App.131–133, 155–56. That evidence included recalls related to products such as car doors, brakes, and air bags, among others. R.1174; R.1175. Almost all of the recalls involved models other than an Elantra, including cars manufactured by Kia, Hyundai's sister company. *See* R.1770:114–116, 120–22; R.1174; R.1175.

The court of appeals affirmed the circuit court's admission of the evidence of the unrelated recalls. It held that "the analysis is not limited by the 'presumed fact' under Wis. Stat. § 903.01." P.App.46, ¶ 90. Instead, the court pointed to § 895.047(3)(b) itself being "silent regarding what evidence a plaintiff may introduce to rebut the presumption." P.App.44, ¶ 86. Relying on general

principles of relevance, the court concluded that the evidence of other recalls "tended to show that vehicles which comply [with federal safety standards] could nonetheless have safety-related defects" and that, "in turn, could support an inference that the 2013 Elantra's satisfaction of those standards was not especially strong evidence that its driver's seat was not defective." P.App.46, ¶ 90.

2. Admission of evidence of subsequent remedial measures

The circuit court admitted evidence about a purported subsequent remedial measure—the seat design in the next-generation 2017 model of the Elantra (known as the AD seat). The circuit court permitted Plaintiffs to introduce evidence about the 2017 seat to "impeach" Hyundai's "defense theories" and "themes," and Hyundai's "general defense of the case." R.1787:168–70, 181–82; P.App.109–113. The circuit court also suggested that evidence about the 2017 seat might be admissible to show "a reasonable alternative design that existed at the time when the product was sold" within the meaning of Wis. Stat. § 895.047(4). R.1787:169; P.App.110. The circuit court interpreted that statutory language to mean "not that it was on the books or on a blueprint; just that the theory relative to that design was in existence." R.1787:169; P.App.110.

The court of appeals affirmed the admission of the AD seat design as a reasonable alternative design without considering the impact of Wis. Stat. § 903.01. The court held that the Vanderventers satisfied § 895.047 by presenting evidence that the

AD seat "could have been practically adopted as of the time of sale" of Plaintiffs' car. P.App.49–50, ¶¶ 96–97 (citing *Murphy v. Columbus McKinnon Corp.*, 2021 WI App 61, ¶ 52, 399 Wis. 2d 18, 963 N.W.2d 837). Thus, according to the court, the AD design "existed at the time when the [relevant] product was sold." P.App.48–50, ¶¶ 94–97 (citing Wis. Stat. § 895.047(1)(a)). Separately, the court held that the design was admissible as impeachment evidence. P.App.53–54, ¶¶ 104–07. The court held that Plaintiffs could impeach testimony before it was ever given. P.App.54, ¶ 107. And the court held that, even if it was error to allow anticipatory impeachment evidence, that error was harmless. P.App.54–56, ¶¶ 108–10.

3. Plaintiffs' experts' causation testimony

The circuit court allowed two of Plaintiffs' experts to vouch for each other's causation opinions, even though neither could reliably provide such confirming opinions.

Plaintiffs introduced expert testimony from Mr. Vanderventer's surgeon, Dr. Kurpad, to offer medical opinions based on his treatment of the plaintiff. But Dr. Kurpad did not limit his testimony to that subject matter. Instead, he also offered causation opinions involving the separate scientific field of biomechanical engineering. He admitted that he is a medical doctor, "not an engineer," R.1787:51, and that he knew nothing about how Mr. Vandeventer's body moved during the accident, R.1787:139. But Kurpad nonetheless opined that a fulcrum from defective headrest posts caused a fracture in Mr. Vanderventer's spine, that Mr. Vanderventer's spine could not have fractured

simply by the force of movement caused by the accident, and that the foam padding in the Elantra's seat would not have protected Mr. Vanderventer against injury from the headrest posts beneath. R.1787:50–54, 65, 72–73, 79–80. He said he based that opinion on his personal inspection of Mr. Vanderventer's seat, which he said allowed him to "see what was being suggested as the anatomy, as the structure of the seat and location with respect to his body build and relative position." R.1787:50–51. He said this "satisf[ied] [him] as a mechanism of [Vanderventer's] injury." *Id*. In connection with his biomechanical opinion, Kurpad conceded that he did not analyze the force necessary for the prongs to cause the injury. R.1787:140.

Saczalski also offered causation opinions beyond his field of expertise (which is biomechanical engineering). He testified that he is "not a medical doctor." R.1763:205. Nonetheless, Dr. Saczalski repeatedly testified that a deformation of the headrest guides "caused Mr. Vanderventer's paralysis," R.1763:35, 134, and that Mr. Vanderventer would not "have been paralyzed in this accident" had he been sitting in a different kind of seat. R.1763:35–36.

The circuit court undertook a high-level assessment of the reliability of Kurpad's testimony, and did not discuss Kurpad's lack of expertise, knowledge, or information supporting his testimony relating to mechanics of how the prongs caused the injury, as opposed to his medical diagnoses. R.1767:6–15; P.App.142-51. As to Saczalski's specific-causation opinion, the circuit court made no determination that the opinion satisfied the

Daubert statutory requirements, but instead simply referred to other cases admitting other testimony. R.1757:134–36; P.App.76–78.

In affirming, the court of appeals never addressed the reliability of Kurpad's specific biomechanical-focused causation opinion related to the prongs. Instead, the court concluded that "[t]he trial court appropriately relied on Kurpad's experience and observations as furnishing a sufficient basis for his opinion." P.App.39, ¶ 73. As for Kurpad's conceded lack of knowledge of the facts and data to support his opinion, the court dismissed those points as "going to the weight, not the admissibility, of his opinions." P.App.39, ¶ 74. The court again took a high-level approach to assessing reliability of Saczalski's medical opinions, explaining that "Saczalski's expertise as a mechanical engineer, his experience in the fields of biomechanics and motor vehicle safety, and his work in understanding the forces involved in motor vehicle accidents qualified him to testify about how the forces generated by the accident *could have* resulted in Edward's spinal injury." P.App.42, ¶ 79 (emphasis added). The court did not address Saczalski's statements that the headrest did cause Mr. Vanderventer's paralysis or that Mr. Vanderventer would not have suffered paralysis had he been in a different seat. P.App.40, ¶¶ 75–79.

4. Plaintiffs' expert's defect theory

In support of his opinion concerning a defect in the Elantra's seat/headrest, Saczalski did not test his theory that the headrest prongs created a fulcrum. Saczalski acknowledged that his

standard practice is to run dynamic tests (*i.e.*, crash or sled tests) to verify his theories. R.1765:66. Yet, even though his theory here was novel, Saczalski acknowledged that he did not follow his typical approach. R.1763:241. Instead, Plaintiffs' counsel used a different model seat with a different headrest, with the headrest placed in a different position than Mr. Vanderventer's headrest at the time of the accident, and conducted a dynamic test on that seat. R.1763:241; R.1765:81, 84, 86–87.

The circuit court undertook only a conclusory reliability analysis of Saczalski's novel opinion, never articulating how Saczalski's headrest-prongs theory could be reliable when applying the *Daubert* factors. R.1765:147–50; P.App.119–22.

Affirming on this point, the court of appeals understood the circuit court to have "viewed Saczalski's methodology as being rooted in his professional experience." P.App.32, ¶ 61. The court of appeals also indicated its unwillingness "to disturb trial court findings [concerning reliability] grounded in an expert's 'professional experience, education, training, and observations.'" P.App.33, ¶ 63 (citing *State v. Hogan*, 2021 WI App 24, ¶ 29, 397 Wis. 2d 171, 959 N.W.2d 658). As for the failure of Saczalski to conduct testing of his novel theory, the court held that the "lack of dynamic testing of the UD seat was [simply] grist for the mill on cross-examination," but did not render Saczalski's testimony unreliable. P.App.37, ¶ 68. The court distinguished numerous cases holding otherwise because, in the court's opinion, Saczalski "bridged the analytical gap" between his observations and his

opinion by reviewing data, applying principles of deformation, and comparing seats. P.App.36, ¶ 67 (citation omitted).

ARGUMENT

I. This Court should make clear that the statutory presumption that a specific product is not defective cannot be rebutted by evidence of *other* product recalls.

The court of appeals held that evidence of 85 voluntary recalls over 30 years, of products *unrelated* to the 2013 Elantra's driver's seat (including recalls even of non-Hyundai cars), rebuts the statutory presumption that the 2013 Elantra's seat is not defective because it complies with federal safety standards. That cannot be the law. The appellate court's contrary conclusion—which will revolutionize product-liability practice in Wisconsin if it stands—cries out for this Court's review.

As part of the 2011 tort-reform package, the Wisconsin legislature enacted § 895.047(3)(b), which provides that "[e]vidence that the product, at the time of sale, complied in material respects with relevant standards, conditions, or specification adopted or approved by a federal of state law or agency shall create a rebuttable presumption that the product is not defective." The legislature enacted that presumption against the backdrop of a statute that directs how a statutory presumption can be rebutted. Under § 903.01, "[e]xcept as provided by statute, **a presumption . . . created by statute**, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but **once the basic facts are found to exist the**

presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of *the presumed fac*t is more probable than its existence." (Emphases added).

No Wisconsin appellate court has analyzed the interplay between those two statutes before this case. The court of appeals' decision—which allows rebuttal of the § 895.047(3)(b) presumption with evidence of recalls of unrelated products, in direct contravention of § 903.01 and applicable caselaw—will rob that statutory presumption of any efficacy. No rational manufacturer will invoke the presumption if it opens the door to highly prejudicial evidence of unrelated recalls.

The court of appeals correctly noted that § 895.047(3)(b) "is silent regarding what evidence a plaintiff may introduce to rebut the presumption." P.App.44, ¶ 86. While that is true, that is hardly the end of the story. First, statutory language must be interpreted "in relation to the language of surrounding or closely-related statutes." *State v. Reyes Fuerte*, 2017 WI 104, ¶ 26, 378 Wis. 2d 504, 904 N.W.2d 773 (citing *Kalal*, 271 Wis. 2d 633, ¶ 46). Here, the "closely-related statute[ ]" is § 903.01. More, under settled Wisconsin law, "[t]he legislature is presumed to act with full knowledge of existing case law when it enacts a statute[, and] [a] statute must be interpreted in light of the common law and the scheme of jurisprudence existing at the time of its enactment." *Strenke v. Hogner*, 2005 WI 25, ¶ 28, 279 Wis. 2d 52, 66, 694 N.W.2d 296, 302. And this Court long ago explained that the standard of proof in § 903.01 is a "uniform quantum of proof for

every presumption." *Kruse v. Horlamus Indus., Inc.*, 130 Wis. 2d 357, 366, 387 N.W.2d 64 (1986). Thus, the legislature did not need to address the manner for rebutting the presumption in § 895.047(3)(b) because it had already enacted § 903.01, which provides the manner for rebutting any statutory presumption. In § 903.01, the legislature made clear that the sole means for rebutting a statutory presumption is to prove the nonexistence of the presumed fact.

Wisconsin appellate courts have recognized that § 903.01 provides the exclusive manner to rebut statutory presumptions. This Court construed § 903.01 as applicable to all statutory presumptions that do not specifically address the manner for rebutting the presumption. In a case concerning whether the standard of proof in § 903.01 for rebutting presumptions applied to a statutory presumption, this Court described it as a "uniform quantum of proof for every presumption," and indicated that the standard of proof identified in § 903.01 would govern the question of "the nonexistence of the presumed fact." *Kruse*, 130 Wis. 2d at 366; *accord In re Interest of Kyle S.-G*, 194 Wis. 2d 365, 374, 533 N.W.2d 794 (1995) (citing 7 Daniel D. Blinka, *Wis. Practice* § 301.4 at 52 (1991)) (once a presumption is triggered, the party opposing it "bears the burden of proving 'that the nonexistence of the **presumed** fact[] is more probable than its existence'" (emphasis in original)). Consistent with *Kruse*, the court of appeals in another case recently applied § 903.01 to mean that the only way to rebut a statutory presumption (absent some specific provision in the applicable statute) is to present evidence of the nonexistence of the

presumed fact. *See Biehl v. Hyde*, No. 2021AP868, 2022 WL 10224999, *6 (Wis. Ct. App. Oct. 18, 2022) (unpublished).

By contrast, the court of appeals here rejected the mandatory interplay between § 895.047(3)(b) and § 903.01. Importantly, the court of appeals did not dispute that the presumed fact in this case is that the seat in the 2013 Elantra is not defective. Nor did the court of appeals contest that evidence of unrelated recalls does not rebut that presumed fact. That should have compelled the conclusion that the circuit court improperly admitted the unrelated-recalls evidence. But the court held that "the analysis is [not] limited by the 'presumed fact' under Wis. Stat. § 903.01." P.App.46, ¶ 90. The court instead applied the general relevancy statute (Wis. Stat. § 904.01) and held that "[t]he recall evidence tended to show that vehicles which comply with [federal safety standards] could nonetheless have safety-related defects," which "in turn, could support an inference that the 2013 Elantra's satisfaction of those standards was not especially strong evidence that its driver's seat was not defective." P.App.46, ¶ 90.

The court of appeals' analysis is deeply flawed for two reasons. *First*, it ignores the plain language of § 903.01, as well as the cases construing that statute, which shows that the only way to rebut a statutory presumption like the one in § 895.047(3)(b) is to present evidence of the nonexistence of the presumed fact.

Second, the court of appeals' analysis nullifies the policy judgment at the heart of § 895.047(3)(b). That section provides that compliance with federal regulatory standards creates the rebuttable presumption that the product is not defective. The court

of appeals, however, stated that the evidence of other recalls shows that compliance with federal safety standards is not "especially strong" evidence that the product in question is not defective. P.App.46, ¶ 90. In other words, the court of appeals believes that a party should be able to present evidence to undermine the wisdom of the statutory presumption, as opposed to evidence to establish the nonexistence of the presumed fact. Rather than "defer to the policy choice[] of the legislature," *Warehouse II, LLC v. State Dep't of Transp.*, 2006 WI 62, ¶ 14, 291 Wis. 2d 80, 715 N.W.2d 213, the court of appeals second-guessed it by admitting evidence that called into question the basis for the presumption. That approach is "antithetical to the job of the judge, which is to apply the statute's meaning despite judicial misgivings, not to second-guess the legislature's wisdom in choosing to enact it." *Backus v. Waukesha Cty.*, 2022 WI 55, ¶ 26, 402 Wis. 2d 764, 976 N.W.2d 492 (R.G. Bradley, J., dissenting).

If allowed to stand, the court of appeals' decision will nullify § 895.047(3)(b). Recalls of other products amount to irrelevant propensity evidence and have no probative value concerning whether the product at issue is defective. The court of appeals' decision creates a perverse scheme where a manufacturer who invokes the presumption in § 895.047(3)(b) opens the floodgates for the opposing party to introduce evidence of other recalls of other products stretching back decades—in this case, to the 1980s.

Self-preservation will motivate manufacturers to forgo the benefit of the statutory presumption because evidence of other recalls is so prejudicial. The trial here demonstrates that

prejudice. After being allowed to inform the jury of the unrelated recalls, Plaintiffs' counsel repeatedly invoked those unrelated recalls, including with witnesses. R.1768:151–52; R.1770:85–89; R.1771:215–16; R.1776:26, 50. Plaintiffs' closing argument underscores the prejudice. Counsel directed the jury to the 85 recalls and told them that "8.4 million cars . . . had defects, safety defects." R.1776:26. Counsel also argued that there were "86 recalls that affected over 8.4 million cars. 8.4 million cars on the roadway carrying moms and dads and kids and grandmas and grandpas and aunts and uncles." *Id.*

Not only is the court of appeals' decision inconsistent with the plain language of § 903.01 and associated caselaw, but the decision is also out of step with the rulings by courts in other states with similar presumption statutes. Those courts have universally held that the presumption can be rebutted by evidence showing that ***the product at issue*** was defective, unsafe, or dangerous in some way despite its compliance with safety regulations. *See, e.g., Miller v. Bernard*, 957 N.E.2d 685, 696 (Ind. Ct. App. 2011); *McClarty v. C.R. Bard Inc.*, No. 414CV13627TGBRSW, 2020 WL 6075520, at *8 (E.D. Mich. Oct. 15, 2020); *Fortune v. Techtronic Indus. N. Am.*, 107 F. Supp. 3d 1199, 1202 (D. Utah 2015); *McDonald v. Schriner*, No. 218CV02084JTFDKV, 2019 WL 1040978, at *6 (W.D. Tenn. Mar. 5, 2019); *Miller v. Lee Apparel Co.*, 19 Kan. App. 2d 1015, 881 P.2d 576, 585 (Kan. App. 1994). Those cases do not hold that evidence of defects in other unrelated products can rebut the presumption. Indeed, more generally, "[e]vidence about different products and dissimilar accidents has

long been inadmissible, as it generally proves nothing while distracting attention from the accident at hand." *In re Graco Children's Prods., Inc.*, 210 S.W.3d 598, 601 (Tex. 2006).

II. This Court should restore the plain meaning of § 895.047(4) by clarifying that "reasonable alternative design[s] *that existed at the time when the product was sold*" do not include purely theoretical concepts that, in hindsight, merely *could have* been adopted.

As amended in 2011, § 895.047(4) provides that, although evidence of subsequent remedial measures "is not admissible" to show a manufacturing defect, it can be used to show that a "reasonable alternative design" was available. Yet, critically, not just any "reasonable alternative design" will do. The design must have "*existed at the time when the product was sold.*" Wis. Stat. § 895.047(4) (emphasis added). Underscoring the significance of this qualifier in subsection (4), the Legislature deliberately declined to append an "existing at the time" modifier to "reasonable alternative design" in Wis. Stat. § 895.047(1)(a), where it appears as one among several requirements that a plaintiff must meet to prevail in his affirmative case.

In affirming the circuit court's admission of a subsequent remedial measure (the 2017 AD seat) in this case, the court of appeals gave an unjustifiably broad interpretation of the statute. Parsing § 895.047(4) for the first time in a published Wisconsin appellate decision, the court of appeals completely missed the significance of the "existed at the time" language, thereby side-stepping a critical statutory protection for manufacturers. Specifically, it affirmed the circuit court's admission of the 2017

seat to show that Hyundai could have designed its 2011 model differently, reasoning that the 2017 design, in hindsight, "could have been practically adopted as of the time of sale." P.App.49, ¶ 96 (citation omitted).

For this proposition, the court of appeals cited its decision in *Murphy v. Columbus McKinnon Corporation*, 2021 WI App 61, ¶52, 399 Wis. 2d 18, 963 N.W.2d 837. But *Murphy* is inapposite. The *Murphy* court considered the use of the unadorned "reasonable alternative design" phrase in § 895.047(1)(a), where it is listed as an element of a strict-liability claim. *Id.*, ¶ 39. It did not address § 895.047(4)'s subsequent-remedial-measures provision.

Led astray by its misreading of *Murphy*, the court of appeals here failed to appreciate that, under Wisconsin's canonical principles of statutory interpretation, the phrase "reasonable alternative design" and the clause "reasonable alternative design that existed at the time when the product was sold"—appearing in the very same section of the Wisconsin Statutes—must mean different things. *Responsible Use of Rural & Agr. Land (RURAL) v. Pub. Serv. Comm'n of Wis.*, 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888 ("If a word or words are used in one subsection but are not used in another subsection, we must conclude that the legislature specifically intended a different meaning.") (citation omitted). After all, judges are to "give reasonable effect to every word" in a statute, "in order to avoid surplusage." *Kalal*, 2004 WI at ¶ 46. If the court of appeals' ruling stands, then the statutory phrase "*that existed at the time when the product was sold*" in Section 895.047(4) will become entirely meaningless, and the

circumstances in which manufacturers will be held liable because of "could've, should've" hindsight bias will prove limitless.

III. The court of appeals' holding that subsequent-remedial-measures evidence may be used for anticipatory impeachment of expected testimony conflicts with this Court's decision in *Voith v. Buser* and therefore is likely to confuse courts.

Wisconsin Statute § 904.07 bars subsequent-remedial-measures evidence "to prove negligence or culpable conduct," but "does not require the exclusion" of such evidence "when offered for . . . impeachment."

Applying this statute, the circuit court admitted evidence of the subsequent 2017 Elantra seat to "impeach" Hyundai's "defense theories" and "themes," and "Hyundai's general defense of the case." But this rationale cannot be squared with language in *D.L. by Friederichs v. Huebner*, 110 Wis. 2d 581, 601–02, 329 N.W.2d 890 (1983). There, this Court noted that commentators had recognized that the circuit court's theory would mean that "any time a defendant controverted an allegation of negligence," a plaintiff "could bring in evidence of subsequent remedial measures to prove prior negligence or culpable conduct" under the "guise of impeachment." This Court suggested that for such evidence to be admissible for impeachment, it must "reflect on the [impeached] witness's testimony." *Id.* at 608.

No doubt recognizing that the circuit court had disregarded key language in *Huebner* in admitting subsequent-remedial-measures evidence to "impeach" Hyundai's general defense of the case, the court of appeals recharacterized the circuit court's

decision as permitting use of the measures to impeach certain specific testimony that Hyundai would offer later in the case. P.App.54, ¶ 107.[3]

In so doing, the court of appeals created a conflict with a controlling decision of this Court. It accepted the settled principle that "for evidence of subsequent remedial measures to be admissible for impeachment purposes, the evidence must contradict a fact to which a witness has testified." P.App.51, ¶ 103 (quoting *Estate of Brown v. Physicians Ins. Co. of Wis., Inc.,* No. 2010AP274, unpub. slip op. ¶ 19 (WI App Feb. 8, 2011)). Yet the court missed that "impeaching evidence to attack credibility is inappropriate and inadmissible prior to the time that issue of credibility has arisen in the course of trial." *Voith*, 83 Wis. 2d at 544. In other words, the court of appeals endorsed the concept of anticipatory impeachment, which this Court has prohibited.

This Court's prohibition on anticipatory impeachment comports with common sense and fairness. A party cannot know for certain which witnesses his opponent will call, let alone what the witnesses will say, until they actually testify. To allow subsequent-remedial-measures evidence for impeachment of testimony that may never actually occur would stretch the language of § 904.07 past the breaking point—the court of appeals would permit impeachment evidence when there may end up being

[3] The court of appeals also suggested that the subsequent-remedial-measures evidence could have been admitted to impeach a slide that Hyundai showed during its opening statement. P.App.54, ¶ 106. But the court acknowledged that § 904.07 allows impeachment only of a witness's testimony, P.App.53, ¶ 103, and there was no suggestion that the slide was the subject of any witness's testimony.

nothing to impeach.[4]

IV. This Court should clarify that the admissibility of an expert's testimony must be assessed on an opinion-by-opinion basis under Wis. Stat. § 907.02(1).

Wisconsin's expert-testimony law states that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1). This statute codifies the federal *Daubert* standard. *In re Commitment of Jones*, 2018 WI 44, ¶ 7, 381 Wis. 2d 284, 911 N.W.2d 97.[5] Under § 907.02, the circuit court must act as the "gatekeeper" and "make a threshold determination as to whether the [expert] evidence is reliable enough to go to the factfinder." *Id.* ¶ 32. "[T]he court's 'role [is to ensure] that the courtroom door remains closed to junk science.'" *Id.* ¶ 33 (citation omitted).[6]

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[4] For reasons that Hyundai provided below and will explain in its merits briefing should this petition be granted, the circuit court's error in admitting this evidence was far from harmless. For present purposes, it is enough to point out that this Court routinely grants review of important questions of law pursuant to the § 809.62(1r) criteria regardless of whether answering those questions would ultimately result in affirmance, vacatur, or reversal. *See, e.g.*, *State v. Reinwand*, 2019 WI 25, 385 Wis. 2d 700, 924 N.W.2d 184; *State v. Harvey*, 2002 WI 93, ¶ 6, 254 Wis. 2d 442, 647 N.W.2d 189.

[5] Wisconsin courts therefore look to federal case law for guidance in this area. *See State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995).

[6] Since the Legislature codified the *Daubert* standard in 2011, this Court has interpreted the updated language on only two occasions. *See In re Commitment*

To perform a *Daubert* analysis that adheres to the statute, a court cannot make a general conclusion that an expert is qualified to testify reliably on some topic and, based on that, deem all of his or her opinions to be admissible. Instead, if an expert will provide separate opinions on separate issues, the circuit court must perform a separate *Daubert* analysis as to each opinion.

Federal courts have recognized that each "separate opinion" of an expert "must meet the *Daubert* standard"—"[l]itigants may not offer all of an expert's testimony so long as they can search and find some portion that is admissible." *Joiner v. Gen. Elec. Co.*, 78 F.3d 524, 536–37 (11th Cir. 1996), *rev'd*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (Smith, J., dissenting). Hence, in *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771 (7th Cir. 2017), for example, the Seventh Circuit recognized that the expert was offering two opinions—one "regarding the cause of [a] fire" and one "regarding the cause of the internal fault" in a product—and so analyzed each of the opinions separately under *Daubert*. *Id.* at 783–88 (emphases omitted). Similarly, this Court recognized even before Wisconsin's adoption of *Daubert* that "[a]n expert witness, though qualified to testify, may not be qualified to testify with regard to a particular question." *In re Termination of Parental Rts. to Daniel R.S.*, 2005 WI 160, ¶ 36, 286 Wis. 2d 278, 706 N.W.2d 269; *see also Martindale v. Ripp*, 2001 WI 113, ¶ 52, 246 Wis. 2d 67, 629 N.W.2d 698 ("[A] witness eminently capable on one subject

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of Jones, 2018 WI 44; *Seifert v. Balink*, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816. No opinion garnered a majority in *Seifert* and this Court's opinion in *Jones* did not confront any complex questions of interpretation or application of the statute.

may not be sufficiently qualified to give helpful testimony on another, albeit related, issue in the case.").

The court of appeals approved the admission of causation opinions by both Kurpad and Saczalski—which had the effect of vouching for the other's causation opinion—without assessing the admissibility of those specific opinions. Dr. Kurpad was Mr. Vanderventer's treating physician, and he offered several medical opinions. But Kurpad went beyond the field of medicine to offer a biomechanical-engineering opinion concerning how the purported problem with the prongs caused Mr. Vanderventer's injury. *See supra* pp. 10–11. The court of appeals did not evaluate the reliability of that specific opinion, instead holding that Dr. Kurpad "drew on his knowledge and experience, along with his surgical observations, review of Edward's medical records, and information from Saczalski about the accident, to opine that the headrest prongs had caused Edward's spinal fracture." P.App.39, ¶ 73. But the record reveals that this is not accurate—Dr. Kurpad gave the biomechanical opinion as his own. *See* R.1787:50–51, 65, 86, 124–34. The court of appeals thus failed to address entirely the problem with the circuit court's decision—that Dr. Kurpad's causation opinion about a fulcrum causing Mr. Vanderventer's injuries was unreliable and inadmissible under § 907.02.[7]

[7] When confronted with Kurpad's numerous concessions that demonstrated the lack of reliability of his biomechanical causation opinion, the court of appeals held that those issues went to the weight, not the admissibility, of the opinion. But numerous courts have refused to water down *Daubert*'s reliability requirements by deferring to the availability of cross-examination as a sufficient substitute. *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).

That failure of the court of appeals to do a deep dive on the reliability of Kurpad's biomechanical causation opinion gives short shrift to *Daubert* reliability requirements, because, as the Seventh Circuit has recognized, "when asked to admit scientific evidence," a court "must determine whether the evidence is genuinely scientific," and not "unscientific speculation offered by a genuine scientist." *Rosen v. Ciba-Energy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996).

Likewise, the circuit court erroneously allowed—and the court of appeals erroneously upheld—medical causation testimony from Dr. Saczalski, whose expertise is biomechanical engineering, without performing a fulsome *Daubert* analysis on that specific opinion. Dr. Saczalski repeatedly testified that a deformation of the headrest guides "caused Mr. Vanderventer's paralysis." 1763:35, 134. And Dr. Saczalski opined that Mr. Vanderventer would not "have been paralyzed in this accident" had he been sitting in a different kind of seat. R.1763:35–36. But, just as Dr. Kurpad was not an engineer and therefore could not opine on engineering questions, Dr. Saczalski was not a medical doctor and could not opine on what did or would cause paralysis in Mr. Vanderventer. Indeed, federal courts routinely hold that "biomechanical engineers are not qualified to testify 'as to whether [an] accident caused or contributed to any of plaintiff's injuries,' as this would amount to a medical opinion." *Rodriguez v. Athenium House Corp.*, No. 11 CIV. 5534 LTS KNF, 2013 WL 796321, at *4 (S.D.N.Y. Mar. 5, 2013) (citation omitted); *see also Smelser v. Norfolk S. Ry. Co.,* 105 F.3d 299, 305 (6th Cir. 1997), *abrogated on*

other grounds by Morales v. Am. Honda Motor Co., Inc., 151 F.3d 500 (6th Cir. 1998); *Bowers v. Norfolk S. Corp.*, 537 F. Supp. 2d 1343, 1377 (M.D. Ga. 2007), *aff'd*, 300 F. App'x 700 (11th Cir. 2008).

Because of this rudimentary error, the circuit court allowed two experts in a case to vouch for the other's opinion, skirting *Daubert*. Kurpad repeated Saczalski's biomechanical opinion as Kurpad's own, and Saczalski repeated Kurpad's medical opinion as Saczalski's own. That won't fly under *Daubert*: "[a] scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty." *Dura Auto. Sys. of Ind. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002). To allow experts to provide back-up support for other experts' opinions is highly prejudicial. Here, for example, a juror harboring serious doubts about Saczalski's credibility could have decided to accept Saczalski's opinion after Kurpad (whom perhaps the juror found credible) repeated it, or vice versa.

If permitted to stand, the court of appeals' decision will effectively nullify the adoption of *Daubert* in § 907.02(1). The decision turns back the clock to the pre-2011 era when an expert who is deemed qualified in some area can offer any relevant opinion, with any assessment of reliability left for the jury. This Court needs to clarify this developing area of law to ensure that the legislature's policy choice is respected.

V. This Court should clarify the application of Wis. Stat. § 907.02 to novel, untested expert theories created for litigation.

The circuit court's gatekeeping role under § 907.02 is

especially important when an expert devises a novel theory solely for the litigation. Courts are "suspicious of methodologies created for the purpose of litigation, because 'expert witnesses are not necessarily always unbiased scientists.'" *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 408 (6th Cir. 2006), *abrogated on other grounds as recognized by A.K. ex rel. Kocher v. Durham Sch. Servs., L.P.*, 969 F.3d 625, 629–30 (6th Cir. 2020) (citation omitted). Thus, when an expert has "developed . . . opinions expressly for the purpose of testifying," "the party proffering [the opinions] must come forward with other objective, verifiable evidence that the testimony is based on 'scientifically valid principles.'" *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317–18 (9th Cir. 1995) (*Daubert II*).

In this context, the *Daubert* analysis becomes even more searching, especially on the "key" factor of testing. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993). Hence the Seventh Circuit has overturned the admission of expert testimony when the expert's "theory [was] novel and unsupported by any article, text, study, scientific literature or scientific data produced by others in his field." *Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002). The admission was particularly erroneous because the expert "did not conduct any scientific tests or experiments in order to arrive at his conclusions," and thus "the absence of any testing indicates that [the expert's] proffered opinions cannot fairly be characterized as scientific

knowledge." *Id.*[8]

Heedless of this fundamental principle of *Daubert* doctrine, the court here affirmed the admission of Saczalski's novel defect opinion without a robust assessment of its reliability. Saczalski did not conduct available testing on the Elantra's seat. *See* R.1787:241; R.1765:66. This lack of testing was particularly noteworthy because Saczalski developed his headrest-prongs theory only after his testing showed his initial theory to be wrong. R.1787:190–91. Unlike courts in other jurisdictions that have applied *Daubert*'s reliability requirements in this context, the court of appeals accepted the circuit court's reliance on Saczalski's knowledge and experience along with Saczalski's review of tests not conducted on the precise product at issue. P.App.32, ¶ 61. The court of appeals never disputed that a test on the Elantra's seat—which Saczalski admitted would have been part of his standard process for developing a defect opinion—would have shown whether Saczalski's opinion was reliable. Indeed, even though the court of appeals acknowledged that "testing can be important in showing that an expert has employed a reliable methodology, and its absence can indicate that an expert has not brought the same level of intellectual rigor to the courtroom that an expert applies outside of it," P.App.35, ¶ 64, the court of appeals nonetheless approved the abdication of the circuit court's gatekeeping role by concluding

[8] Indeed, testing is one of the most important factors in product-liability cases, and a lack of testing renders an expert's opinion unreliable. *See*, *e.g.*, *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 870 (7th Cir. 2001); *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 894–95 (7th Cir. 2011); *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 290–91 (4th Cir. 2021); *Nease*, 848 F.3d at 232–33.

that Saczalski's lack of product-specific testing "was grist for the mill on cross-examination." P.App.37, ¶ 68.

To be sure, this tactic of kicking tricky questions of expertise to the jury was common under the old regime. But the 2011 reforms overthrew it.

Given the importance of application of the *Daubert* standards in products-liability cases, this Court should provide much-needed guidance to circuit courts on how reliability should be assessed when a proposed expert presents a novel scientific hypothesis.

CONCLUSION

For these reasons, this Court should grant this petition for review.

Dated this 25th day of November, 2022.

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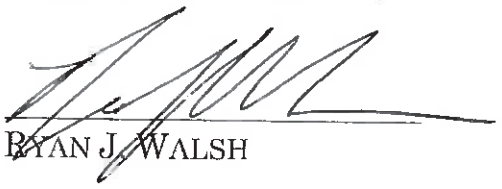
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.62(4) and 809.19(8) (b), (bm), and (c) for a petition produced with a proportional serif font. The length of this petition is 7,958 words.

Dated this 25th day of November, 2022.

Respectfully submitted,



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This electronic petition is identical in content and format to the printed form of the petition filed as of this date.

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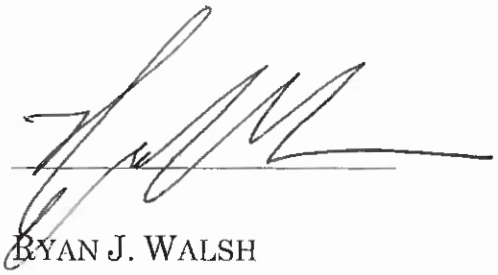

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RYAN J. WALSH

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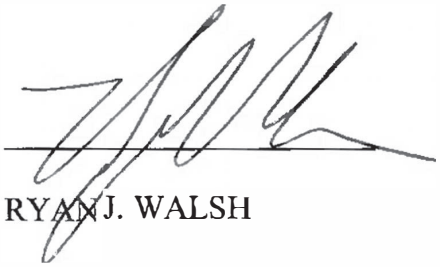
Per Wis. Stat. § 809.80(4), I certify that on November 25, 2022, this petition for review and appendix were delivered to a third-party commercial carrier for delivery to the Clerk of the Court. I further certify that the brief or appendix was correctly addressed.



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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2022, I caused true and correct paper copies of the foregoing petition and separate appendix to be delivered to counsel of record and parties. addressed as follows:

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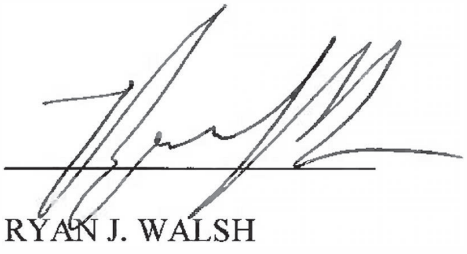

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