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SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2020AP001052

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.

RESPONSE TO PETITION FOR REVIEW

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

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STATEMENT ON CRITERIA FOR REVIEW

While the arguments of Hyundai Motor Company and Hyundai Motor America (collectively, "Hyundai") certainly sound dramatic, a closer look reveals only mundane discretionary evidentiary decisions are at issue. When the actual record is considered, this case provides no opportunity for any significant development of the law. Hyundai's exaggerated pronouncements do not match the reality of the issues presented. After "careful review of the record and the parties' arguments," the unanimous appellate court could find "no basis to disturb the jury's verdict." *Vanderventer v. Hyundai Motor America*, 2022 WI App 56, ¶3. (P.App.002.) Careful review will similarly reveal no basis to grant review because the discretionary decisions at issue do not meet the criteria for review of Wis. Stat. §809.62(1r).

To the contrary, Hyundai's statement of the §809.62(1r) criteria admits that it seeks error correction. (*See* Petition for Review ("PFR"), p.4.) That is not the function of this court. Hyundai then exaggerates statements from the appellate court's analysis in its efforts to cast this case as one which meets the §809.62(1r) criteria. However, even limited scrutiny demonstrates that Hyundai's contentions do not hold water.

For example, Hyundai incorrectly contends that the appellate court declared it was "not bound by Wis. Stat. §903.01" when considering what evidence was admissible to rebut Wis. Stat. §895.047(3)(b)'s presumption.[1] Not true. The appellate court actually concluded, correctly, that the circuit court did not misuse its discretion in applying these statutes to reject Hyundai's myopic view of the "presumed fact" given this record. *Vanderventer*, 2022 WI App 56, ¶90. (P.App.0046.) Hyundai's own broad assertions about the scope of the regulations it chose to put at issue, which were actually minimum standards, were one basis for the circuit court's admission of limited recall evidence. (R1757:147-

[1] PFR, p. 4.

151;P.App.0084-0088;R1769:122-125.) Because Hyundai's trial strategy decisions drove the circuit court's holding, the court's decision to admit limited recall evidence is nothing more than a discretionary determination based on these unique facts, a situation not likely to recur.

Because the appellate court's holding is not as Hyundai represents, this "issue" is not even presented here. Thus, review would be improvident. Moreover, this case is not an appropriate vehicle to provide any guidance regarding interpretation of §895.047(3)(b), because the fact-specific nature of the circuit court's decision does not provide that opportunity.

Hyundai's arguments over subsequent remedial measures are similarly flawed. Both lower courts applied the unambiguous language of Wis. Stat. §§895.047(4) and 904.07 in admitting this evidence. The discretionary decision to admit such evidence when applying these unambiguous standards to this unique record presents no opportunity to further develop the law. Moreover, Hyundai now concedes that such evidence was admissible under §904.07 for "impeachment," but raises for the first time an order of proof issue over "anticipatory impeachment." Setting aside that this issue was not raised in Hyundai's motions after verdict or appeal, it plainly ignores the right to call and impeach adverse witnesses (as Vanderventer did) under Wis. Stat. §§906.11(3) and 906.07. The circuit court's discretion over the order of proof is "well established" and not an issue meriting review.

Hyundai's arguments regarding Wis. Stat. §907.02, Wisconsin's *Daubert* standard,[2] similarly misrepresent the facts and law.

First, the existing body of law regarding *Daubert* makes review unnecessary. Hyundai's false assertion that this court has provided precedential guidance with respect to *Daubert* on only one occasion (PFR, p.6), ignores

[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

multiple cases.[3] Moreover, the attacks on the circuit court—who has presented on *Daubert* to Wisconsin judges—are unwarranted. He is particularly familiar with that body of law and correctly applied it to the unremarkable evidentiary issues. These *Daubert* "issues" are not the sort that will provide guidance.

Worse, the particular *Daubert* issues Hyundai purports to raise are simply not issues in this case. Eviscerating Hyundai's argument that the lower courts gave only an overall analysis of the admissibility of expert opinions, the circuit court expressly declared that it reviewed *Daubert* objections "question by question." (R1762:56.) The circuit court addressed the specific objections Hyundai raised and the appellate court reviewed those discretionary decisions. If the holdings were too "high level," Hyundai has only its own trial strategy to blame. *State v. Gary M.B.*, 2004 WI 33, ¶11, 270 Wis.2d 62, 676 N.W.2d 475 (party's trial strategy is not a basis for relief).

Hyundai's final contention, that this court should consider whether §907.02 requires testing for "novel scientific opinion[s]," suffers from the same fatal flaw. There was no such issue. The science at the heart of this suit was simple and undisputed. Hyundai's biomechanical expert agreed the changed angle of the posts was "basic physics" and just a "lever." (R1773:208.) More importantly, Vanderventer did conduct testing. As the trial court explained, rejecting Hyundai's attempt to paint the science as "novel":

> [We're talking about a seat design…that everyone agrees is to dissipate energy away from the occupant and to reduce the risk of harm as well as *to prevent invasion of seat parts into the occupant's body.* The physics is simple. The science is quite simple.…*These are not complicated concepts.*

(R1778:77-78)(emphasis added.) Because there was no "novel" scientific theory, there is no issue to review. *See, e.g., Lapsley v. Xtek, Inc.*, 689 F.3d 802, 815–16

[3] Hyundai's frequent citation to concurrences and even dissents should also raise concerns over the soundness and scholarship of its arguments. *In re Commitment of Jones*, 2018 WI 44, ¶¶43-45, 381 Wis.2d 284, 911 N.W.2d 97 (R. Bradley, J., concurring.)

(7th Cir. 2012)(experts not required "to drop a proverbial apple each time they wish to use Newton's gravitational constant.")

Because the issues it raises do not exist here, Hyundai's attempt to paint this case as presenting an opportunity to "clarify" certain "tort reform" statutes falls flat. Moreover, many of Hyundai's arguments for review —for example, advocating to further limit admissibility of expert opinions to stymie injured plaintiffs' claims—appear to be calls for judicial activism and remarkably short-sighted. Section 907.02 applies in all Wisconsin cases, including civil litigation between businesses and criminal prosecutions. Because Hyundai's focus is too narrow, accepting review could have unintended results adversely affecting other types of actions.

In addition to misrepresenting the nature of the issues, Hyundai misstates the facts. Though the evidence must be viewed in the light most favorable to the verdict, *Zartner v. Scopp*, 28 Wis.2d 205, 209, 137 N.W.2d 107 (1965), Hyundai exaggerates certain facts while ignoring those supporting the verdict. Although the Vanderventers cannot list every fact Hyundai misstates or ignores, they point out many below. Hyundai's misstatements are further reason to deny review. §809.62(3)(c).

Trial courts retain substantial discretion in deciding whether to admit evidence, including expert testimony, even after *Daubert*. *In re Commitment of Jones*, 2018 WI 44, ¶33, 381 Wis.2d 284, 911 N.W.2d 97. Once the circuit court has identified and employed the proper law, admission of evidence is a judgment call reviewed deferentially. *Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶23, 403 Wis.2d 369, 976 N.W.2d 584. All of the issues in this case involve unremarkable judgment calls, in the context of a complex and fact-intensive case. The lower courts carefully and even-handedly addressed each one. Hyundai's need to invent issues not existing in this case or the lower courts' holdings is a tacit admission that this case does not meet the criteria for review.

This court should deny Hyundai's petition for review.

STATEMENT OF FACTS

The appellate court's decision supplies most of the facts necessary for consideration of the petition. The Vanderventers supply these additional facts:

I. Additional facts regarding the collision and injuries.

Edward Vanderventer, the driver, was the only person seriously injured in the collision. (R1766:82-83,89.) Multiple complications of his paralyzing injuries, including ossification of his hips, have rendered him bedridden and required numerous hospitalizations and surgeries. (R1766:89-90,96-97.)

Hyundai did not raise any issue regarding the damages awarded in its appeal.

II. Testimony and evidentiary rulings.

A. Introduction.

On appeal, Hyundai misstated the facts and law. For example, there it falsely argued that the circuit court gave short shrift to consideration of §907.02. (App.Brf., p.21.) Thus, the appellate court explained that the circuit court considered Hyundai's §907.02 objections multiple times. *Vanderventer*, 2022 WI App 56, ¶¶30-36; (P.App.0016-20.) Here, Hyundai again skews the facts, though now in different ways.

B. Recall evidence was properly admitted for a limited purpose.

Hyundai sought to take advantage of the rebuttable presumption set forth in §895.047(3)(b) by presenting evidence that its vehicles met Federal Motor Vehicle Safety Standards ("FMVSS"). At trial, Hyundai's expert testified that FMVSS are scientific, stringent, and "quite difficult to and challenging to meet because they are crafted to meet the need for motor vehicle safety..." (R1769:122-124.) That expert testified that vehicles cannot be sold unless they meet all of the FMVSS requirements. (Id.) He denied that FMVSS were minimum standards. (Id.)

However, the legislation creating the FMVSS expressly states that they are minimum standards which are not intended to affect civil liability. 49 U.S.C. §§30102(a)(10), 30103(e). While vehicles must comply with FMVSS to be sold,

recalls are required when a "defect" exists. *Manieri v. Volkswagenwerk A.G.*, 376 A.2d 1317, 1323-24 (N.J.App.Div.1977) (Act requires manufacturer to notify owners "of any defect in the vehicle which might relate to motor vehicle safety" and mandates recalls)(internal quotation omitted.)

The circuit court permitted evidence of recalls because of Hyundai's broad assertions. (R1757:148,150; P.App.0085,0087.) Hyundai's complaints that the court admitted evidence of years of recalls involving different models, different defects, and even different brands should not mislead the court. Those details were never heard by the jury. *Vanderventer*, 2022 WI App 56, ¶92. (P.App.0047-48.) That 85 Hyundai vehicles were subject to recalls was admitted for the limited purpose of showing that vehicles passing FMVSS standards can nonetheless have safety-related defects. (R1766:13;P.App.0135.) As the appellate court explains, the circuit court observed that taking of judicial notice was vastly different than agreeing that all of the recall evidence could go to the jury. *Id.*, ¶39. (P.App.0021.)

Both lower courts determined that admission was appropriate and not prejudicial because Vanderventer's use of such evidence was severely limited and narrowly tailored to its purpose—rebutting the presumption. *Vanderventer,* 2022 WI App 56, ¶92. (P.App.0047-48); (R1778:125-26.)

C. Both lower courts rejected Hyundai's mid-trial objection to the "AD."

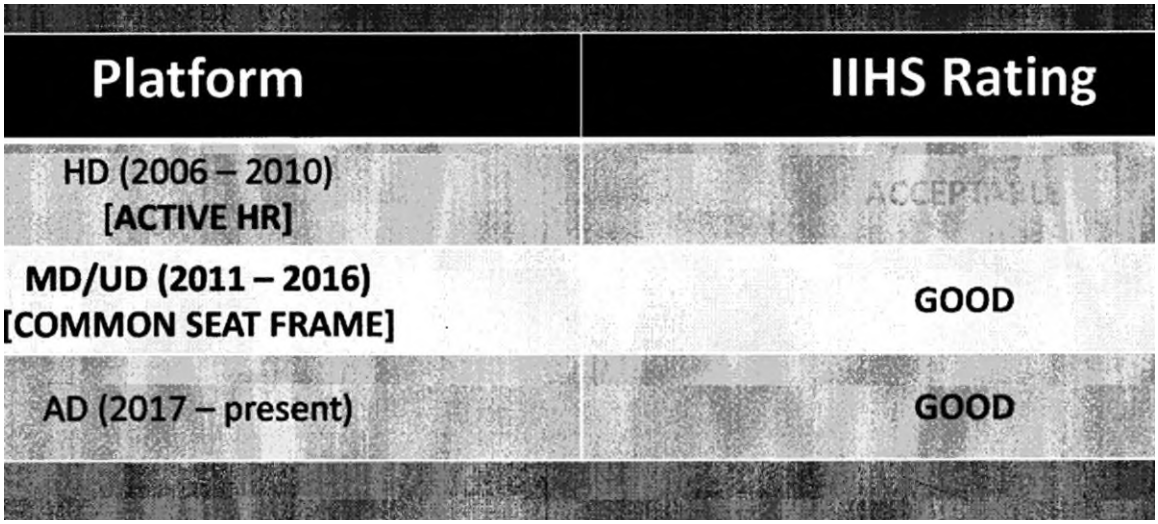
Hyundai's 2017 AD seat used ***the same "***panel" or "unibody" design as its 2007 seat, both omitting the UD's defective hollow tube upper seat structure:

- One Hyundai engineer testified that the AD reverted to Hyundai's 2007 panel design (R979:6), while another confirmed the AD was just an updated generation of that prior design. (R906:39-40.)
- Hyundai introduced engineering drawings from its 2007 "optimization project" showing the critical upper seat frame panel/unibody design later incorporated in the AD. (R1768:77-79;R1294:1-2;R1295:11-13;R1531:31;R1778:117-120,132-35.)

- When this issue was argued at trial, Hyundai did not dispute the AD was "virtually identical, technically the same design" as the 2007 seat. (R1787:168.)
- Vanderventers' expert, Saczalski, testified that the AD's upper seat frame (the portion relevant to the UD's claimed defect) was the "same" as Hyundai's 2007 seat, and the AD contained no "technological breakthrough." (R1763:23.)

Admission of the AD was initially uncontroverted. Pre-trial discovery, depositions, and disclosures referenced the AD. (R979:6;R906:39-40.) Vanderventers designated deposition testimony from Hyundai engineers' about the AD they would introduce at trial. (*Id.*;R481.) Hyundai lodged no pre-trial objection to this AD testimony under the agreed-upon procedure. (R511;R531.) Hyundai also did not file a pre-trial motion to exclude the AD. (R323-31.)

During opening statements, without objection, both parties discussed and directed the jury's attention to the AD on display in the courtroom. (R1761:31,82,107.) Hyundai emphasized "the dimensions of the UD, the HD, and the AD are all very similar." (R1761:82.) Hyundai then showed the jury a slide comparing the IIHS safety ratings of the AD and UD seats, emphasizing both were equally rated "good":



(R606;R1761:107.)

Mid-trial, Hyundai back-tracked and objected to Vanderventer's continued use of the AD. (R1787:156.) The circuit court denied Hyundai's objection, ruling the AD was admissible for impeachment under §904.07 and to show a "reasonable alternative design that existed at the time when the product was sold" under §895.047(4). (R1787:168-70;R1778:119-20.) The court of appeals affirmed that discretionary decision. *Vanderventer*, 2022 WI App 56, ¶¶93-110.(P.App.0048-56.)

Regardless, both courts determined that its admission was harmless and not prejudical because: (1) Hyundai used the AD seat, (2) Hyundai did not request a limiting instruction, and (3) its use was insignificant at trial.[4] *Id*. ¶¶106-110. (R1778:119-20,177.)

D. The lower courts rejected Hyundai's *Daubert* challenges to Kurpad and Saczalski.

The circuit court rejected Hyundai's *Daubert* challenges to Kurpad and Saczalski before, during, and after trial. (R1757:23-32,92-93,135-135,159-60;R1787:58-60;R1778:86-91.) None were "global rulings." (*Id*.) Each time, the ruling focused on Hyundai's specific challenges to the expert's opinion and claims that each ventured into the other's field. (*Id*.)

Both lower courts agreed Kurpad was not presenting independent biomechanical opinions. *Vanderventer*, 2022 WI App 56, ¶71. (P.App.0038.) (R1757:159-160.) Rather, he "garnered… information on biomechanics" from Saczalski which he "used to make a causal connection" based on his medical observations. *Id*. The court of appeals remarked: "the trial court made an extended record of the legal standards governing the admissibility of expert testimony" and

[4] The AD was not Vanderventer's primary alternative design, but was just one of seven exemplar seats that did not have the critical defective upper seat structure of the UD. (R1763:22-24,35-36.)

its ruling had a "rational basis" in the "facts" and "governing law." *Id.* ¶¶31, 72. (P.App.0016-17,0038.)

Hyundai similarly mischaracterizes Saczalski's testimony. Saczalski described the thorough process he applied to reach his conclusions in this case, including reviewing documentary evidence, running tests, and inspecting the vehicle. (R1787:185-93,236.) He conducted a forensic analysis, including attendance at the de-trimming of the seats. There, he observed that the posts of the head restraint were permanently deformed 20 degrees forward from their design angle, ***now pointing towards Vanderventer's back, rather than away from it.*** (R1763:144-145.) In contrast, the front passenger's posts remained pointed rearward; the lighter passenger did not deform the hollow tube structure as Vanderventer had. (R1504:73;R694:2;R.1763:222;R1787:185-87.)

Saczalski opined that the physical evidence and biomechanics showed that the posts formed a fulcrum in Vanderventer's back at level T-6, causing the fractures and other injuries along that same "axial" or horizontal plane. (R1763:35,134-137,151,226-231;R1787:121,234-236.) The physical evidence supporting Saczalski's opinions included not only the bent, buckled and deformed seat frame, but also permanent crush marks in the foam of the seat. (R1763:134-137,145;R.1772:8.) Even Hyundai (apparently without thoroughly examining the physical evidence) agreed that such crush marks in the foam would be damning evidence of causation. (R1761:100.)

Hyundai's 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. (R1763:185-86;R.1772:29.) He had to, given the physical evidence of the posts' forward deformation. (R1763:144-145.) The deformities were evident:

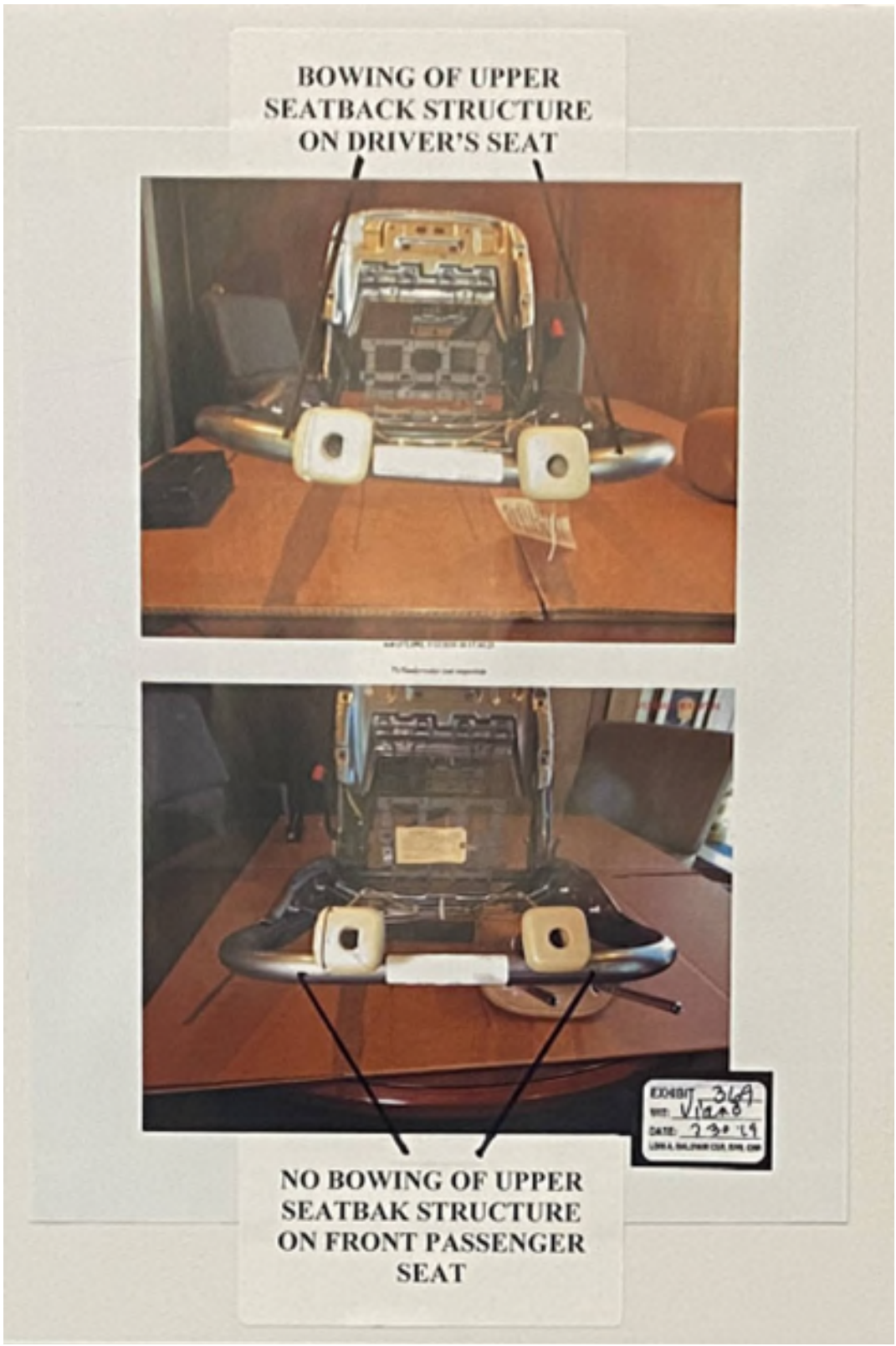

BOWING OF UPPER
SEATBACK STRUCTURE
ON DRIVER'S SEAT
EXHIBIT 364
NO BOWING OF UPPER
SEATBAK STRUCTURE
ON FRONT PASSENGER
SEAT

Fig.1(R920.)

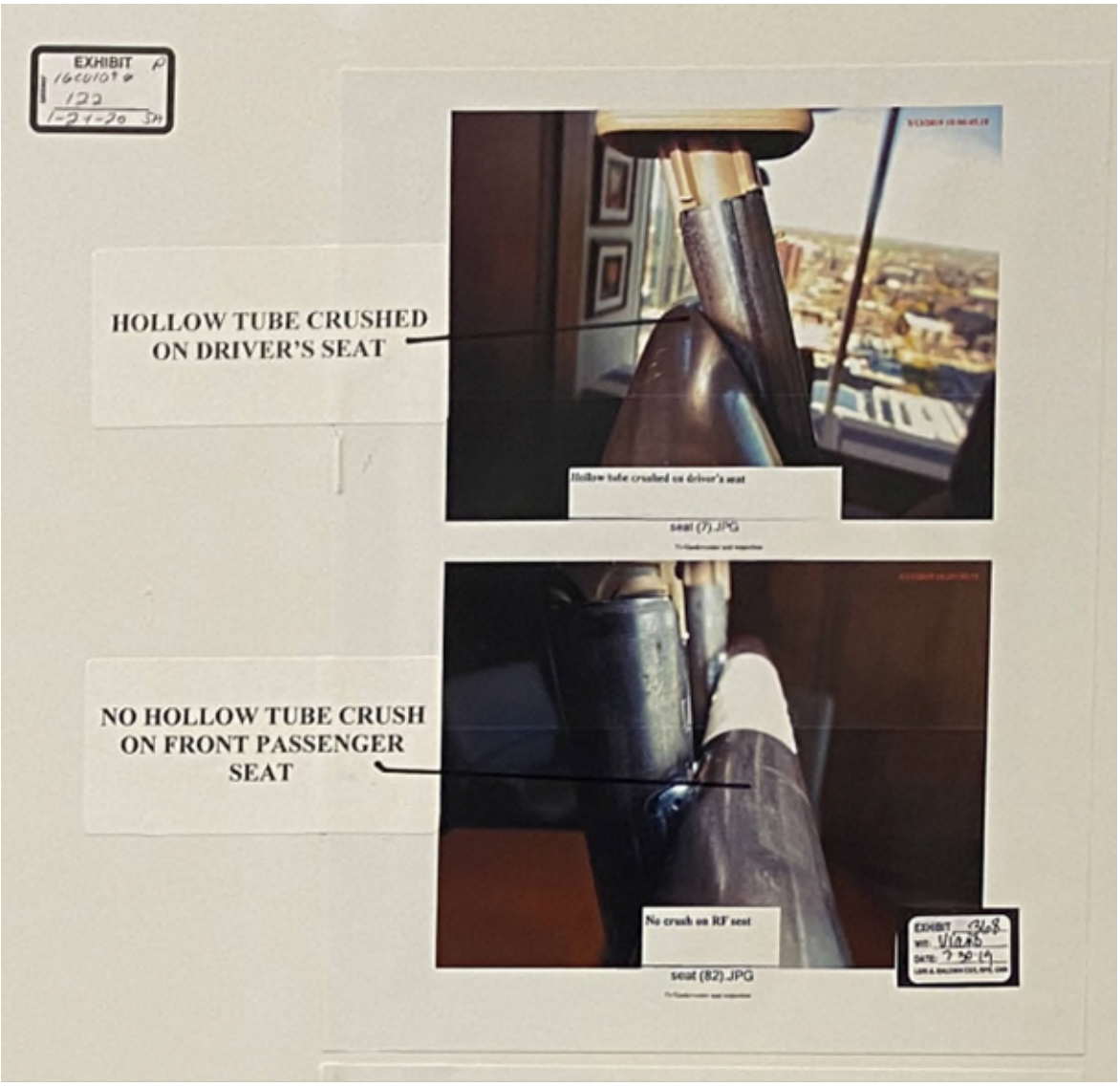


Fig.2(R920.)

The circuit court carefully considered each of Hyundai's objections to Saczalski's testimony, applying the correct legal standard and concluding that the opinions were reliable and admissible. (R1757:23-32,92-93,135-136;R1765:147-150;R1765:148-149;R642;R1787:194-196,203-211;R1778:103-104,107-110.)

Using basic biomechanics and the undisputed physical evidence, Saczalski explained that, as Vanderventer put pressure on the head restraint, the posts rotated toward him, creating the injurious fulcrum. (R1763:35;R1787:187-194.) Saczalski's biomechanical causation opinions were confirmed by Kurpad's opinion that the medical evidence showed Vanderventer's injuries were caused by

a localized blow from the rear at T6. (R1763:23-24,40-41,52-53,65.) However, contrary to Hyundai's argument, neither expert "vouched" for the other. Notably, Hyundai provides no record citation for the alleged "vouching."

E. Saczalski's opinions were not "novel" scientific theories.

Hyundai also mischaracterizes the "novelty" statement in Dr. Saczalski's testimony. He considered all potential causes of Mr. Vanderventer's injury, a "focal load" at level T6 of his thoracic spine, but using the forensic process, the cause became evident when the seats were de-trimmed. (R1787:184-94.) The bending and buckling of the driver's seat became visible, as did the forward position of the prongs when the headrest was reinserted into the driver's seat (it had come out during the collision). (R.1787:190-193.) Hyundai's experts did not disagree that the posts had permanently deformed, now pointing toward Vanderventer's back, rather than away. (R1771:226-27,1773:216.)

Nonetheless, Saczalski confirmed this observation with testing and physical evidence. He reviewed Vanderventer's medical records, consulted with Kurpad, reviewed the crash data, biomechanics of the crash, and physical evidence, removed and de-trimmed the seats with Hyundai's experts, compared the seats to exemplar seats, conducted mathematical testing, and relied on Vanderventer's sled testing of the alternative design, and thoroughly examined all vehicle crash damage. (R844-46;R1787:186-188,226,235-236,262-63.) As to testing, he relied on Hyundai's testing, incorporated independent sled testing of the alternative design, and conducted his own mathematical testing of the defect. (R844-46;R1787:226,262-63.) The physical evidence included not only the bent frame but also the permanently-rotated posts and permanent marks and gouges on the seat foam where it was crushed between Ed's back and the posts during the crash. (R1763:134-137,145;R.1772:8.)

Nothing about this science was novel or even complex.

It is undisputed that one function of an automotive seat is to protect the occupant in a rear-end collision. The forces in a rear-end crash cause the occupant

to move into and load the seatback, making the seat the occupant's primary protection (unlike a frontal crash, where the seatbelt and airbag protect the occupant). (R1787:185-86.) The seatback must act like a "catcher's mitt," allowing the occupant to pocket within it and providing "uniform support" to the spine. (R1787:185-86;R1763:157-58.) That is because, as every technical witness and expert agreed, a "spine in extension meeting up with a fulcrum" is particularly susceptible to fracture. (R1769:13;R1768:103;R1771:211-212;R1787:54.) Any intrusion, ***even 4-5 millimeters,*** can cause "devastating injury." (R1787:47,70,234.)

Hyundai's own witnesses demonstrate the falsity of Hyundai's purported basis for review. Not only did Hyundai's biomechanical expert publish a paper regarding this mechanism of injury in 2011 (R.1408), Hyundai's lead seat designer ***identified this exact defect and mechanism of injury*** in an engineering drawing ***before this vehicle was manufactured***:

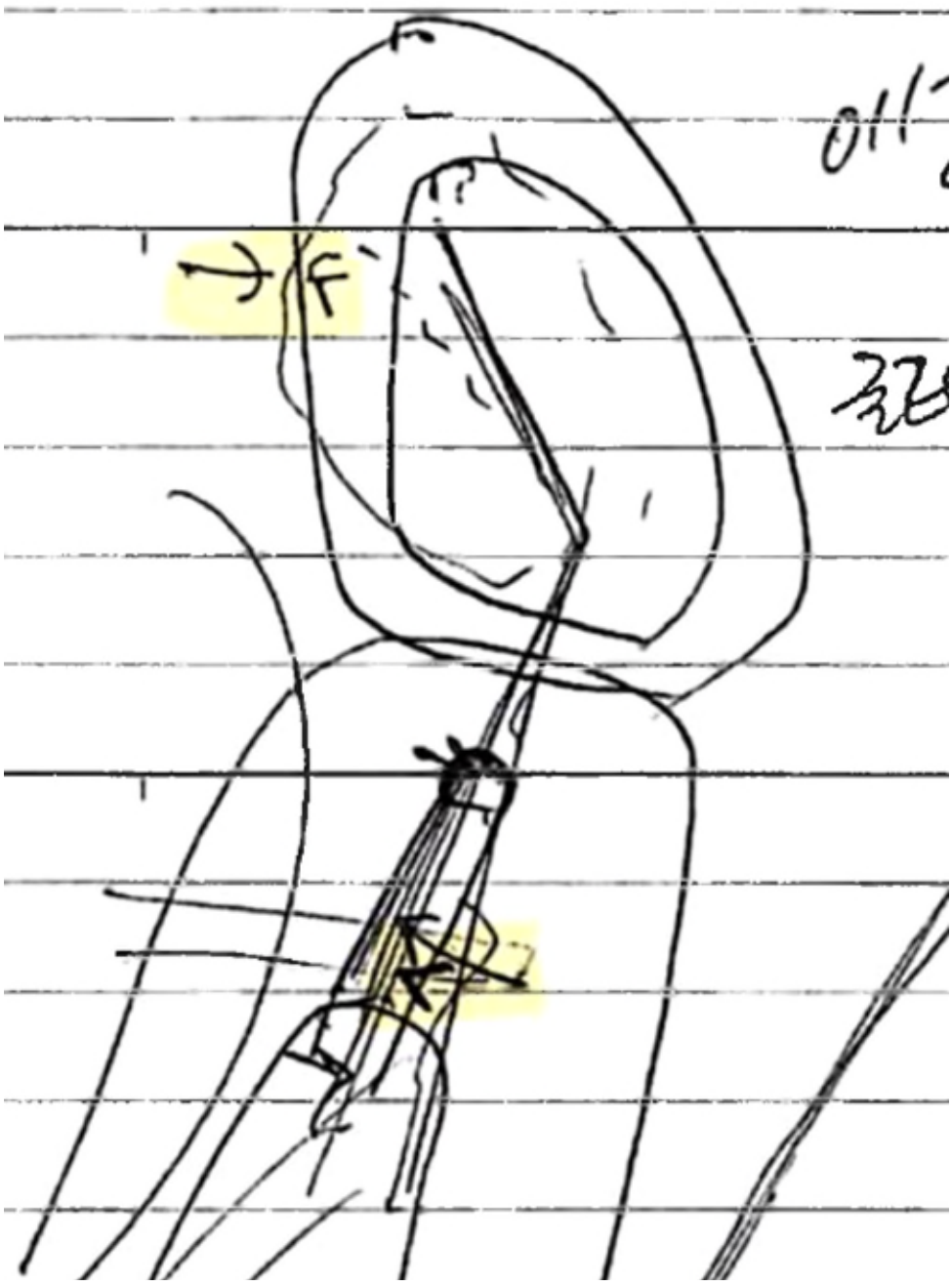


Fig. 3(R847)(Note arrows depicting force and rotation.)

This drawing shows Hyundai's knowledge that force ("F") on the head restraint would cause the posts to rotate toward an occupant's spine, exactly how plaintiffs contended that Ed was injured. (R1763:167-168.) This is not a

complicated scientific proposition: Hyundai's biomechanical expert agreed the changed angle of the posts was "basic physics" and just a "lever." (R1773:208.)

The circuit court astutely observed that the science was "quite simple" and mostly agreed upon. (R1778:77-78.) Moreover, that court acknowledged that it was impossible to know whether a similar injury had previously occurred because "every accident" is not studied, limiting the "knowledge base." (R1757:98.)

ARGUMENT

REVIEW IS NOT WARRANTED BY THIS CASE.

I. A fact-specific discretionary decision to admit limited recall evidence relevant to rebut the statutory presumption does not satisfy any criteria for review.

Hyundai's arguments about recall evidence can best be characterized as much ado about nothing. First, even if the court grants review, admission of the recall evidence cannot affect the judgment in this case. That evidence was admitted for a limited purpose, to rebut the §895.047(3)(b) presumption, ***only*** with respect to Vanderventer's strict liability claim. (R1757:81.) The presumption expressly states that it does not apply to negligence claims. §895.047(6). Because no recall evidence was admitted as to the negligence claim, on which Vanderventer also prevailed (R1485:2), admission of recall evidence cannot affect the judgment. This alone is reason enough to deny review. §809.62(3)(b).

Second, Hyundai's overwrought arguments regarding the presumption created by §895.047(3)(b), and its interplay with §903.01, do not identify any issue that warrants review. The lower courts' holdings are garden-variety evidentiary decisions, dependent primarily on Hyundai's own broad assertions regarding FMVSS. (R1769:122-124,174;R1757:147-148;R.1767:18-19;P.App.0084-85,0154-55.)

Subsection (3)(b) provides:

> Evidence that the product, at the time of sale, complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency shall create a rebuttable presumption that the product is not defective.

The legislature made the presumption rebuttable and did not circumscribe the evidence permitted to rebut it. Thus, Hyundai's arguments for review—that the legislature intended to impose unwritten evidentiary limitations—are invalid on their face.

Moreover, this case involves not a question over what evidence is admissible to satisfy plaintiff's burden that "the product" was defective, but instead what evidence was relevant to rebut the presumption created by the broad evidence Hyundai chose to introduce regarding the FMVSS. The facts here are thus too unique to provide guidance regarding the scope of the presumption in other cases.

Relevance itself does not require review. It is defined in Wis. Stat. §904.01 and this court has explored that definition numerous times, concluding it is defined broadly and that, consequently, there is a "low threshold" for admissibility. *State v. Richardson*, 210 Wis.2d 694, 707, 563 N.W.2d 899 (1997). The lower courts had no difficulty in applying the familiar concept of relevance to §895.047(3)(b). Review is neither necessary nor warranted.

That is particularly true because the factual context is critical in assessing relevance. As explained, Hyundai introduced evidence that its seat complied with FMVSS standards and that the standards themselves were not minimum standards but instead were very stringent safety measures. (R1769:122-125.) Thus, the circuit court allowed recall evidence to rebut that evidence. (R1757:148-150; R.1767:18-19;P.App.0084-85,0154-55.) Because Hyundai's litigation strategy broadened the scope of the inquiry, its complaint that the circuit court did not limit the evidence available to rebut the presumption rings quite hollow.

Moreover, whether evidence rebuts a presumption is a discretionary decision of the circuit court, not a question of law. The circuit court's decision was eminently reasonable because the legislation creating the FMVSS expressly states

that they are minimum standards which are not intended to affect civil liability, 49 U.S.C. §§30102(a)(10), 30103(e), directly rebutting the testimony of Hyundai's expert. Further, while Hyundai introduced evidence that vehicles can only be sold if they comply with the FMVSS, as mentioned above, the legislation specifically contemplated that some vehicles which complied with FMVSS could have "defects" sufficient to require recall. *See*, *Manieri*, 376 A.2d at 1323-24.

That Congress prescribed a recall process to address "defects" in vehicles which necessarily comply with the FMVSS in itself demonstrates not only that the circuit court's discretionary determination was reasonable, but also that Hyundai's argument is meritless. The lower courts did not question or undermine the legislature's "wisdom" in establishing the rebuttable presumption. Instead, the circuit court correctly observed that recalls show that a manufacturer cannot rely on FMVSS "minimum standards...to be a general safety threshold for all aspects of the car," as Hyundai's expert opined. (R1757:147-148;R1778:125.) Thus, the appellate court properly affirmed, because evidence of 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." *Vanderventer*, 2022 WI App 56, ¶90. (P.App.0046.)

Hyundai did not bother to ask the court for a limiting instruction with respect to the recall evidence. *Id.*, ¶82 (P.App.0046.) Its petition's contentions regarding the recall evidence are greatly overblown.

Because the circuit court's decision to admit the limited recall evidence hinged, in large measure, on Hyundai's litigation choices, this case is ill-suited for review. Such a factual situation is not likely to recur. Moreover, addressing the issue in the context of these complex facts, including facts regarding Hyundai's litigation strategy, would not lend itself to providing guidance with respect to

application of the statute in cases with different litigation strategy or a different type of standard.

Hyundai's citation to cases from other jurisdiction only creates more reason to deny its petition. These cases did not directly consider the issue for which Hyundai cites them, whether evidence of recalls is limited to recalls of the same product or component. Because Hyundai's argument regarding these cases is misleading, review is not merited. §809.62(3)(c).

In any event, *Miller v. Lee Apparel Co.*, 881 P.2d 576, 584–85 (Kan.App.1994), actually supports Vanderventer's arguments, recognizing that claimants have been able:

> …to prevail when legislative or administrative standards did not meet an appropriate level of safety. For example, in '*Raymond v. Riegel Textile Corp.,*' 484 F.2d 1025 [1st Cir.1973], the claimant was able to show that a standard promulgated under the 'Flammable Fabrics Act' was outdated. *See also 'Burch v. Amsterdam Corp.,*' 366 A.2d 1079 [D.C.1976] [when manufacturer knows of greater dangers not included in a statutorily mandated warning, it should bring those precautions to the attention of product users].

Because they are minimum standards, Vanderventer was entitled to show that FMVSS did not prove that the subject vehicle was non-defective, to rebut the statutory presumption and Hyundai's expert testimony. For example, Hyundai's expert admitted that a lawn chair or cardboard box can pass FMVSS 207's seatback strength minimum standard. (R1771:197-198.) Thus, in one trial, "[a]ll the witnesses, including those testifying for DaimlerChrysler, stated that the FMVSS 207 standard that had been in place for thirty years was inadequate." *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 557 (Tenn.2008) (Koch, J. concurring and dissenting). Evidence that FMVSS are minimum standards, are inadequate, and that vehicles which pass them can be recalled for safety hazards was relevant to rebut the presumption and Hyundai's broad evidence of "stringent" FMVSS regulations.

Hyundai's other argument for review, that §903.01 severely limits "the manner for rebutting any statutory presumption," is also meritless.[5] This court has already explained the purpose of §903.01, holding that "[t]his rule of evidence recognizes that once established, a presumption shifts the burden of production and persuasion to the party opposing the presumption." *In re Int. of Kyle S.-G.*, 194 Wis.2d 365, 533 N.W.2d 794 (1995). Nothing in §903.01 circumscribes the nature of proof required to rebut a presumption; it simply addresses the quantum of proof. *Kruse v. Horlamus Indus., Inc.*, 130 Wis.2d 357, 366, 387 N.W.2d 64 (1986). Thus, the issue Hyundai purports to raise regarding §903.01 simply does not exist.

Because this court has already provided guidance regarding the meaning of §901.03, there is no need for review. The lower courts had no trouble applying either §§895.047(3)(b) or 903.01 correctly. Hyundai's incorrect reading of §901.03 and the appellate court's decision is no basis for granting review.

II. Since discretionary admission of the AD under §895.047(4) involves application of unambiguous statutory language to this unique record, review is inappropriate.

Fact-intensive discretionary decisions to admit evidence pursuant to unambiguous evidentiary rules do not invoke this Court's "law development" prerogative meriting further review. *See Cook v. Cook*, 208 Wis.2d 166, 189, 560 N.W.2d 246 (1997); §809.62(1r)(c). Here, the circuit court carefully considered

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[5] Section 903.01 provides:

> Except as provided by statute, a presumption recognized at common law or 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 fact is more probable than its existence.

§895.047(4)'s language when admitting the AD. *Vanderventer*, 2022 WI App 56, ¶94 (P.App.0048). (R1787:169.) Reviewing this unique, lengthy factual record to determine if that discretion was erroneously exercised fell squarely within the court of appeals' error-correcting function. §809.62(1r)(c)1,3.

Hyundai's assertion that the lower courts ignored §895.047(4), allowing undeveloped, "purely theoretical" concepts into evidence as subsequent remedial measures is unfounded. Exaggerated rhetoric that misconstrues isolated phrases to distort courts' reasoning is not a basis for review.

In §895.047(4), the legislature chose to retain claimants' ability to introduce subsequent remedial measures to "show a reasonable alternative design that existed at the time when the product was sold." Obviously, "***subsequent remedial*** measures" are changes ***after*** the sale of a defective product. Section 895.047(4) works together with claimants' burden of proof to show the "foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design…." §895.047(1)(a).[6]

The court of appeals agreed with Hyundai that subsequent remedial measures evidence is only admissible to show "a reasonable alternative design that existed at the time when the product was sold," exactly what the statute says. *Vanderventer*, 2022 WI App 56, ¶94. Neither court held that claimants may bypass this requirement by introducing evidence of yet-to-be-developed "purely theoretical" concepts. *Id*. ¶¶93-100. To the contrary, the court of appeals confirmed that the evidence must relate to an alternative design that "could have been practically adopted as of the time of sale." *Id*. ¶¶96,99. Hyundai's purported concerns over undeveloped "theories" are not at issue because both lower courts

[6] It is difficult to follow Hyundai's convoluted argument that the court of appeals conflated §895.047(4) and §895.047(1)(a). Section 895.047(1)(a) requires a claimant to show a "reasonable alternative design" and §895.047(4) allows the claimant to introduce subsequent remedial measures to "show a reasonable alternative design that existed at the time when the product was sold." The Court of Appeals discussed and adhered to both requirements. *Vanderventer*, 2022 WI App 56, ¶¶93-100. (P.App.0048-51.)

held that such evidence must pertain to a design "in existence" at the time of the defective product's sale. *Id.* ¶¶95-96. (R1787:169.)

The court of appeals appropriately rejected Hyundai's invitation to write a new requirement into §895.047(4) that the claimant produce "a preliminary sketch or outline showing the main features… to be executed."[7] *Vanderventer*, 2022 WI App 56, ¶95. It is well-established that courts do not "rewrite" statutes to arrive at results desired by a party. *Bank of Com. v. Waukesha Cnty.*, 89 Wis.2d 715, 724, 279 N.W.2d 237 (1979). The court's rejection of Hyundai's request to legislate from the bench is not a basis for further review, as the prohibition against doing so is "well settled." §809.62(1r)(c)1.

Even if there were a need for clarification of §895.047(4), this is not the right case to explore it. This case presents perhaps the clearest possible example of admissible evidence under §895.047(4). Here, AD's design not only had been theorized, drawn, and prototyped before Vanderventer's purchase in January, 2014, the "same" design had been mass-produced by Hyundai since 2007. (R1763:23); *Vanderventer*, 2022 WI App 56, ¶95; (P.App.0049) ("the AD included a more robust upper metal frame… and was in this respect the 'same' as the HD seat design Hyundai had used before the UD design."). The evidence far exceeds even Hyundai's proposed standard. Any controversy over application of §895.047(4) "must await a case" where that issue is "squarely presented." *Bergmann v. McCaughtry*, 211 Wis.2d 1, 11, 564 N.W.2d 712 (1997).

Hyundai's argument that this is an issue of "statewide impact" and "likely to recur"[8] because application of §895.047(4) "comes up frequently" is incorrect. Section 895.047(4) deals only with certain evidence in products liability trials,

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[7] Note that §895.047(4) does not necessarily require a claimant to introduce a "design." It permits evidence of "subsequent remedial measures" relevant to show "a reasonable alternative design that existed at the time when the product was sold," which could include a variety of different evidence.

[8] §809.62(1r)(c)2, 3.

which are extremely rare. In the last five years (2017-21), there were 206,392 civil cases filed in Wisconsin state courts, but only 226 products liability cases (.1%), resulting in just 4 jury trials.[9] Review will have negligible future impact as these rare cases are factually complex with dramatic variance in evidentiary issues. This Court recently reviewed another products liability case, *Murphy v. Columbus McKinnon Corp.*, 2021 WI App 61, 399 Wis.2d 18, 963 N.W.2d 837, to clarify the correct interpretation of the products liability statute's burden of proof. Unlike *Murphy*, there is no legal issue of significance here that would have a broad impact on future products liability cases.

III. Since Hyundai does not dispute the AD was admissible for "impeachment," there is no basis to review a discretionary order of proof issue never raised below.

In addition to §895.047(4), evidence of the AD seat was admitted under §904.07 for "impeachment." *Vanderventer*, 2022 WI App 56, ¶¶101-10. (P.App.0051-56.) In products liability cases, subsequent remedial measures are admissible "to impeach the theory of… defense that [the product] was safe as designed..." *D.L. v. Huebner*, 110 Wis.2d 581, 601, 607-08, 329 N.W.2d 890 (1983). Hyundai's witnesses testified that the subject seat was "state of the art," used "the best practices in the industry," was the "most optimized design," and "was abundantly safe." *Vanderventer*, 2022 WI App 56, ¶104. (P.App.0053-54.)[10] Yet in 2017, Hyundai reverted to the sturdier, safer upper seat frame design that was the "same" as Hyundai's 2007 design. *Id*. ¶105. (P.App.0054.) The court of

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9 *See* civil disposition summaries, *available at* www.wicourts.gov/publications/statistics/circuit/circuitstats.htm.

10 The initial debate over the breadth of *Huebner* is moot because the court of appeals agreed with Hyundai's narrower interpretation, applying *Huebner* to impeachment of witness testimony rather than defense theories generally. *Vanderventer*, 2022 WI App 56, ¶¶102-03. The distinction is largely esoteric since defense theories in a products liability cases are presented through lay and expert witnesses. Contrary to Hyundai's representations, the circuit court clarified that the AD impeached Hyundai's "theories" presented by "particular witness[es]." (R.1778:120.)

appeals affirmed the circuit court's appropriate exercise of discretion in determining that "Vanderventers were entitled to impeach this testimony." *Id*. Both lower courts ensured, as *Huebner* instructs, that the AD was not admitted to "prove[] negligence under the guise of impeachment." 110 Wis.2d at 608; *Vanderventer*, 2022 WI App 56, ¶105. (P.App.0054.) Hyundai does not ask this Court to review the ***substance*** of this ruling that the AD was properly admitted for impeachment–***thereby conceding the AD's admission was appropriate***. (Petition, p.2-3,22-23.)

Instead, for the first time in its Petition, Hyundai claims error in the order of proof, arguing that Vanderventer needed to wait until Hyundai began calling witnesses to use the AD. But Hyundai waived any such error by not raising it in motions after verdict or on appeal. *Calero v. Del Chem. Corp.*, 68 Wis.2d 487, 497, 228 N.W.2d 737 (1975). (R323-31;App.Brf.)

Regardless, the circuit court's discretion over the ***order of proof*** is statutorily-created and well-settled and thus not appropriate for review under §809.62(1r)(c). §906.11(1) (circuit court has discretion over the "mode and order" of proof). "The order of proof is largely in the discretion of the trial court which may receive proof out of order subject to be connected by later evidence." *Putman v. Deinhamer*, 270 Wis.157, 164, 70 N.W.2d 652, 656 (1955).

Hyundai's bombastic declaration that allowing "anticipatory impeachment" before an "opponent" calls witnesses stretches the law "past the breaking point," ignores ***this exact practice is explicitly allowed by statute***. In civil cases, plaintiffs have a ***statutory right*** to call the opponent's witnesses adversely for impeachment without waiting for the defense case-in-chief. §906.11(3) ("In civil cases, a party is entitled to call an adverse party or witness identified with the adverse party and interrogate by leading questions."); §906.07 ("**Who may impeach.** The credibility of a witness may be attacked by any party, including the party calling the witness."). Especially in civil cases where witness positions are known from discovery, plaintiffs take extraordinary risk by waiting for rebuttal to present

impeaching evidence that could have been presented earlier. *Rausch v. Buisse*, 33 Wis.2d 154, 166–67, 146 N.W.2d 801 (1966) (rebuttal should only meet "new facts," and courts have discretion to "refuse to receive such evidence"). Hyundai's ignorance of basic trial procedure does not satisfy any criteria for review.

Hyundai's claim that "anticipatory impeachment" allowed by statute conflicts with *Voith v. Buser*, 83 Wis.2d 540, 544, 266 N.W.2d 304 (1978), is equally meritless and does not justify further review. *Voith* dealt with use of details of criminal convictions to impeach credibility after incorrect answers to the "fact and number" questions, which is not at issue here. *Id.* Even reading *Voith* totally out of context, as Hyundai does, there is no conceivable conflict justifying review under §809.62(1r)(d) as *Voith* says nothing about the court's discretion over the order of proof or the plaintiff's right to call and impeach adverse witnesses. *Id*. *Voith* confirms that a party may impeach witnesses when "any issue of credibility has arisen in the course of trial."

Under any reading of *Voith*, there is no question that Hyundai's witnesses' credibility was at issue from the trial's inception, and impeachment in Vanderventers' case-in-chief was appropriate:

- In ***opening statement***, the ***first thing*** Hyundai discussed was the importance of "credibility" of its "highly credentialed" experts, "the Hyundai engineers," and the parties' comparison of the HD, UD, and ***AD seats.*** (R1761:80-82). Hyundai argued the jury's task was to decide **"**whose witnesses are credible." (*Id.*) Hyundai identifies the engineering witnesses it would call and previewed their forthcoming testimony about robust specifications and testing of the UD, its IIHS safety ratings, and its safe design. (R1761:80-82.)
- From extensive pre-trial discovery, it was well-known that Hyundai's witnesses would testify that the UD was exceedingly safe, passed robust testing procedures, and was an optimized design. (R1052-53,1400-06.)
- As §§906.11(3) and 906.07 allow, Vanderventers played adverse deposition testimony of six Hyundai engineers in their case-in-chief.

(R979,982,1016,1028,1049,1051.) These engineers bragged about the UD's safety, that Hyundai's "first priority is safety performance," about UD's "high standards" from IIHS and other specifications, and that the UD was not "less safe" than the AD. (R1016:2,3,5.) This testimony was impeached with the AD. (R979:6;R1051:27-29.)

There was no order of proof issue as Vanderventer correctly used the AD with adverse witnesses in its own case-in-chief. (*Id*.) Hyundai's factual misstatements over when and how the AD was used justify denial of the petition under §809.62(3)(d). Regardless, none of this Court's criteria for review are implicated in discretionary control over the order of proof.

Further review of alleged AD-related errors seems especially pointless because Hyundai no longer contests that substantively, the AD was admissible for impeachment. Even accepting Hyundai's misstatements of the record and law, how could there be prejudicial, reversible error in not waiting a little longer to introduce undoubtedly admissible evidence? The lower courts already held that any purported error was harmless and not prejudicial to Hyundai. *Vanderventer*, 2022 WI App 56, ¶¶106-110. Combing this extensive record to review these discretionary decisions was completed by the court of appeals and does not justify further review.

IV. Fact-intensive *Daubert* analysis of the reliability of Kurpad's and Saczalski's causation opinions does not meet this Court's criteria for review.

Hyundai's petition should be denied because review of the discretionary *Daubert* reliability analysis of Kurpad's and Saczalski's causation opinions are "factual in nature" and present no significant legal question. §809.62(1r)(c). Hyundai's quest for further review rests on two false premises rejected by both lower courts.

The first falsehood is that the circuit court globally concluded that all of Kurpad's and Saczalski's opinions were admissible based only on their

qualifications. To the contrary, the "the trial court made extended record of the legal standards governing the admissibility of expert testimony" and specifically acknowledged "Daubert objections could be made question by question.… it's not a blanket, all-encompassing ruling…." (R.1787:58); *Vanderventer*, 2022 WI App 56, ¶31. (P.App.0016-17.) That *Daubert*'s reliability analysis may differ "opinion-by-opinion" is ubiquitous in the law and does not require further exposition.

Moreover, the circuit court did not conduct a "global" analysis of either experts' opinions based only on his qualifications. It considered and rejected Hyundai's specific causation challenges multiple times as to each expert. (R1757:23-32,159-60;R1787:58-60;R1778:86-91.)

For example, while Kurpad was supremely qualified and had unique experience, education, and training in neurosurgery, injury mechanics, and traumatic spinal injury causation, the circuit court did not rest its decision on qualification alone. (*Id*.) The circuit court specifically analyzed each prong of the *Daubert* test: (R1787:59-60;R1778:87: "Did he have the expertise and knowledge, skill and experience, education and training, absolutely…."; R1787:59-60;R1778:87: "Was the testimony based on sufficient facts or data, yes."; R1787:59-60;R1757:160: "I don't have a problem with his methodology." R1787:59-60;R1778:89: Kurpad "appl[ied] principles and methods reliabl[y] to the facts of the case.") The court of appeals agreed. *Vanderventer*, 2022 WI App 56, ¶72. (P.App.0038-39.)

Hyundai's second false assertion, that Kurpad strayed from medical opinions into biomechanics and Saczalski strayed from biomechanics into medical opinions was correctly rejected by both lower courts. *Vanderventer*, 2022 WI App 56, ¶¶71-79. (P.App.0038-42.) Kurpad repeatedly stated that his opinion was based on surgical observations, review of films/records, and neurosurgery experience, and thus, the circuit court properly rejected Hyundai's argument that Kurpad gave "biomechanical causation opinions." (R1757:23-32;R1757:159-60;R1787:30,58-60,65,93,110,126;R1778:86-91.) Both lower courts agreed that

Kurpad relied on Saczalski for the biomechanics: "He gets information on the biomechanics from somebody else, takes that into consideration, and makes a causation connection." R1757:159-160; *Vanderventer*, 2022 WI App 56, ¶71. Kurpad testified he relied on Saczalski' explanation of the crash "sequence of events" and that the posts "formed a fulcrum," which allowed Kurpad to "explain" causation of Vanderventer's injury from a medical perspective. (R1787:27-28,30-31,91-93,121.)

The basis for Kurpad's causation opinion were medical, not biomechanical factors: "I used the evidence derived from the surgical procedure, direct observations, the anatomy of the fracture and the imaging…." (R1787:30,92.) For example, Kurpad testified:

- "[T]his is a very rare and unusual fracture," resulting from a "blow from the back…" (R1787:27.)
- There was a "divot" and "compression" in the rear portion of the spinal cord and the veins behind the spinal cord were damaged and bleeding, showing localized trauma from behind. (R1787:44-45;R1774:38-39;R1787:46.)
- The fracture "traversed through the two strongest portions of the T6 vertebral body" showing a fulcrum, not DISH, was responsible. A DISH fracture would travel through weaker bone and disc space. (R1787:74-75.)

Hyundai's record citations show how far it will extend to misstate Kurpad's causation opinions as biomechanical. (PFR p.26 *citing* R1787:50-51,65,86,124-34.) For example, on R1787:51, Kurpad testified: "Again, I want to stress to the jury that my opinion -- I'm a surgeon.… I'm not an engineer." On R1787:65, he again confirmed his opinion "it's primarily as a neurosurgeon based on what I think was a rare observation during a surgical procedure and subsequently correlating it with space and time with a mechanism that provided an explanation." Likewise on R.1787:86, he stated:

> Q. Right. You told me that, as you did today, you were rendering an opinion on injury mechanism, correct?
>
> A. As a treating surgeon based on direct observation, yes.

Hyundai's citation to R.1787:124-134 is from ***its own cross-examination,*** where ***Hyundai chose*** to ask questions related to biomechanics. Hyundai fails to explain how this fact-driven analysis meets any criteria for review.

Hyundai's arguments respecting Saczalski's opinions are equally meritless. Saczalski had scientific and specialized knowledge, including knowledge regarding fulcrums, physics, biomechanical effects, and automotive seat design. (R642;R1765:148;R1787:194-196,203-211.) The circuit court held that Saczalski reliably applied principles and methods to the facts; it "listened to his mathematical analysis, his experience and training regarding that." (R1765:148-149.) His analysis was reliable. (R1765:149.)

Hyundai's attacks on the circuit court's *Daubert* analysis are ill-founded and unwarranted. Judge Gasiorkiewicz is extremely familiar with *Daubert* principles, so much so that he teaches them to other Wisconsin judges. (R1767:7; P.App.0143.) He properly relied on authority, including the *Reference Manual on Scientific Evidence* (Federal Judicial Center, 3d ed. 2011), with respect to admission of biomechanical expert testimony. (R1757:92-93,135-136;R1778:103-110.) The circuit court's reasoned analysis, affirmed by the appellate court, reflects application of the correct law to these reliable opinions. Because the lower courts have demonstrated their grasp of *Daubert* and its parameters, review is not necessary.

A further basis to reject Hyundai's petition is that it once again misrepresents both the record and the law. First, similar to Kurpad, the questions Hyundai raised as to Saczalski in its appeal specifically requested ***biomechanical***, not medical, opinions. (App.Brf.51.) Thus, Hyundai's arguments are without any basis in fact. Second, an expert's "qualifications as a biomechanical engineer are precisely what qualifies him to give the testimony regarding the force on

[plaintiff's] body, the types of injury that amount of force could cause, and whether [plaintiff's] alleged injuries were consistent with that analysis." *Pike v. Premier Transp. & Warehousing*, No.13-CV-8835, 2016 WL 6599940, *2 (N.D.Ill.11/8/16). In fact, "a biomechanical expert may opine about whether plaintiff's 'alleged damages were caused by the conduct in question.'" *Id.*, *3, *quoting Reference Manual,* at 942-43 (collecting cases). "[B]iomechanical engineers 'are qualified to testify on injury mechanisms.'" *Id.*, *quoting McKeon v. City of Morris,* 14-CV-2084, 2016 WL 5373068, *6 (N.D.Ill.9/26/16). "While not qualified to diagnose injuries, a biomechanical engineer can 'interpret the diagnoses of (plaintiff's) treating physicians in order to opine on the likely mechanisms of (plaintiff's) injuries.'" *Id.* ("the Court finds (biomechanical engineer) is not making a diagnosis or rendering a medical opinion.").

Because there is extensive authority explaining the type of medical and biomechanical opinions admissible under *Daubert*, and this authority was properly applied by the lower courts to these facts, review is neither necessary nor appropriate.

V. There was no novel scientific theory in this case.

Hyundai next unsuccessfully attempts to spin Saczalski's comment regarding the novelty of the injury into a *Daubert* issue for review. As explained above, Dr. Saczalski's comment regarding the "novelty" of the injury was no comment on the scientific principles underlying his opinion. The circuit court correctly observed that all of the experts agreed on those principles, including that the changed angle of the posts was "basic physics" and just a "lever." (R1773:208.) Hyundai's attempt to distort basic physics into a plausible argument for review must be rejected.

Saczalski's theory was not novel. *Vanderventer*, ¶64, n.17. (P.App.0035.) Regardless, the circuit court "repeatedly and accurately cited the legal standards that govern the admissibility of expert testimony under §907.02, including those applicable to the issue of reliability." *Id.*, ¶60. Though its review of such

evidentiary issues is supposed to be deferential, the appellate court independently reviewed Saczalski's testimony and concluded that it was reliable, citing both the facts and multiple cases supporting its conclusion. *Id*., ¶¶62-63. That conclusion applied to Hyundai's arguments regarding testing. *Id*., ¶¶64-68.

Though it now falsely asserts that Saczalski did no testing, Hyundai previously admitted that Saczalski "facilitated and performed extensive additional testing and performed additional work—including the Quebec sled testing, competitor seat comparisons, and seat headrest analyses…" (R179:4,5,8.) He performed a well-accepted mathematical engineering analysis to determine that the weak hollow tube allowed the posts to rotate toward the occupant and was thus defective. (R844-46;R1787:226,262-63.) He also relied on Hyundai's own testing of the seat, which ***showed this exact defect occurring when the head restraint was loaded***. (R1763:140-147,R855.)

Even if he had not, it is well-settled that *Daubert* does not require testing in every case. *Id*., ¶64. Testing is a discretionary criterion, not a ***requirement***. *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 870 (7th Cir.2001). It is not required for well-settled principles, such as the "basic physics" in issue here, or where infeasible. *Lapsley*, 689 F3d at 815–16; *Schmude v. Tricam Indus.*, 550 F.Supp.2d 846, 851 (E.D.Wis.2008); *aff'd*, 556 F.3d 624, 626 (7th Cir.2009).

The testing Hyundai desires this court to require would be impossible because of "ethical prohibitions about testing someone with DISH and the type of forces that were involved in this particular case." (R1778:87); *Bayer ex rel. Petrucelli v. Dobbins,* 2016 WI App 65, ¶30, 371 Wis.2d 428, 885 N.W.2d 173 (cannot test injuries because of "ethical considerations"). Nonetheless, Saczalski performed and relied on various testing. Further, the physical evidence—the anatomy of the fracture, changed angle of the posts, and damaged seat foam—confirmed causation. (R1763:133-138.)

Hyundai's argument for review—that Wisconsin's 2011 "reforms" somehow mandated testing, though they did not impose any such requirement—

are contrary to both well-settled law regarding *Daubert* and the facts of this case, where Saczalski both relied on and conducted testing. Review is not merited.

CONCLUSION

Hyundai's unfounded arguments do not meet this court's criteria for review. It raises neither important questions of law nor any issues likely to recur. Instead, it requests error correction in the guise of a petition for review. Because the issues actually raised do not meet the criteria for review, this court should deny Hyundai's petition for review.

Respectfully submitted this 9th day of December, 2022.

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CERTIFICATE OF FORM, LENGTH, AND ELECTRONIC FILING

I hereby certify that:

This response to petition for review ("response") conforms to the rules contained in Wis. Stat. §§809.19(8)(b)(bm) and (c) and 809.62(4) for a response produced with a proportional font. The length of this response is 7,969 words.

I have submitted an electronic copy of this response which complies with the requirements of Wis. Stat. §§809.19(8)(b)(bm) and (c) and 809.62(4)(b). The text of the electronic response is identical to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all parties.

Dated this 9th day of December, 2022.

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CERTIFICATION OF HAND-DELIVERY

I certify that on December 9, 2022, this response to petition for review was hand-delivered to the Clerk of the Wisconsin Supreme Court. I further certify that the brief was correctly addressed.

Dated this 9th day of December, 2022.

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