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

BRIEF OF *AMICUS CURIAE* FCA US LLC IN SUPPORT OF THE PETITION FOR REVIEW

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INTEREST OF *AMICUS CURIAE*

FCA US LLC manufactures and sells new cars and trucks in Wisconsin and other states under the brand names Chrysler, Dodge, Jeep, Ram, and Fiat. As a company that must defend product liability lawsuits in Wisconsin and other states, FCA US LLC has a strong interest in ensuring that tort laws and evidentiary rules encourage innovation, reflect sound public policy, and recognize the immense complexity of twenty-first century vehicles. FCA US LLC submits this brief because the company is concerned that the decision below misconstrues key provisions of the Omnibus Tort Reform Act, depriving manufacturers of important legal protections codified in that statute.

INTRODUCTION

In the Omnibus Tort Reform Act adopted in 2011, Wisconsin joined more than a dozen states in codifying a presumption that products are not defective if they comply with applicable governmental safety standards. *See* 2011 Wis. Act 2 (enacting Wis. Stat. § 895.047(3)(b)). This presumption recognizes the substantial time and thought that legislative and regulatory bodies spend developing such standards. Manufacturers know these standards and can adapt their product designs to comply with them. In this way, section 895.047(3)(b) improves the fairness and predictability of Wisconsin tort law. The statute assures manufacturers that, if their products satisfy applicable governmental safety standards, the law will presumptively protect them from liability.

The decision below guts this presumption and weaponizes it against manufacturers. According to the court of appeals, a plaintiff may "rebut" the presumption with evidence of voluntary recalls of *different* products than the one at issue so long as the recalls occurred before the

plaintiff was injured. Thus, once a manufacturer recalls a product—any product—the recall is forever available as evidence against the manufacturer, even if the past recall had nothing to do with the product at issue. The presumption allows a plaintiff to attack a manufacturer with highly prejudicial evidence of *unrelated* past recalls—85 of them in this case.

The Court should grant the petition to restore section 895.047(3)(b) to its legislatively intended position as a presumptive tort shield for manufacturers, not as a sword that a plaintiff can wield against them.

Review is also needed because the court of appeals misapplied the codified *Daubert* standards, which so far have received little attention in this Court. *See* Wis. Stat. § 907.02. The decision below allowed a trial judge to admit untested "expert" opinions simply because the expert was qualified in his field, conflating the gatekeeping *qualification* analysis with the gatekeeping *reliability* analysis. But even qualified experts can offer unreliable opinions. To be admissible, the expert must *both* be "qualified" *and* offer "reliable" opinions. *Id.* § 907.02(1).

This case is an opportunity for the Court to develop the law concerning the newly expanded gatekeeping function and to confirm that trial courts must exclude all unreliable opinions, even those offered by qualified experts.

ARGUMENT

I. The Court Should Grant Review To Restore The Statutory Presumption Of Nondefectiveness.

Section 895.047(3)(b) provides that a product is presumptively "not defective" if it complies with "relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency."

In the trial court, Hyundai invoked this presumption with evidence that the 2013 Elantra's driver's seat complied with applicable federal safety standards. The trial court then allowed the plaintiffs to "rebut" the presumption with evidence that Hyundai and its sister company, Kia, had issued 85 voluntary recalls of products *unrelated* to the 2013 Elantra's driver's seat. Absent this "rebuttal" purpose, there was no conceivable basis for admitting the evidence of unrelated recalls.

The statutory presumption therefore helped *the plaintiffs*, not the manufacturer. Because Hyundai invoked the presumption in this case about a seat that was *not* recalled, the trial court let the plaintiffs introduce highly prejudicial evidence about millions of "moms and dads and kids and grandmas" driving cars with voluntarily recalled airbags, doors, or other unrelated components. R.1776:26.

The Court's review is urgently needed to reverse this judicial conversion of section 895.047(3)(b) from a provision designed to benefit manufacturers into a provision that harms them.

A. The Statutory Presumption Reflects A Legislative Policy Preference To Benefit Manufacturers That Comply With Governmental Standards.

Section 895.047(3)(b) is not unique. Many states have codified a presumption that products are not defective if they comply with applicable governmental standards. *See, e.g.*, Colo. Rev. Stat. § 13-21-403(1); Ind. Code § 34-20-5-1(2); Mich. Comp. Laws § 600.2946(4); N.D. Cent. Code § 28-01.3-09; Okla. Stat. tit. 76, § 57.2(A).

Courts construing these statutes recognize that the presumption embodies a legislative intent "to benefit the manufacturer" by "highlighting for the jury the significance of the plaintiff's burden" and by giving "a kind of legal imprimatur to the significance of compliance

with federal standards." *Egbert v. Nissan N. Am., Inc.*, 2007 UT 64, ¶16, 167 P.3d 1058, 1062 (2007). The purpose of the presumption is "to limit the rights of plaintiffs to recover in product liability suits" and "to strengthen the position of the product sellers/manufacturers." *Miller v. Lee Apparel Co.*, 19 Kan. App. 2d 1015, 1025, 881 P.2d 576, 585 (1994) (quotation marks omitted); *see also Flis v. Kia Motors Corp.*, 2005 U.S. Dist. LEXIS 12911, at *14-15 (S.D. Ind. June 20, 2005) (similar).

This legislative policy choice makes sense. Governmental safety standards generally result from a comprehensive, research-based, and data-driven process that considers the informed views of many experts and stakeholders. Legislatures (and courts and juries) appropriately give weight to such carefully crafted standards when determining whether a product is defective.

In the automotive context, the applicable governmental standards are the Federal Motor Vehicle Safety Standards ("FMVSS"), which are promulgated by the National Highway Traffic Safety Administration ("NHTSA"). The FMVSS are designed to promote safety and ensure that all new vehicles "protect . . . against unreasonable risk of death or injury in an accident." 49 U.S.C. §§ 30101, 30102(a)(9). Before selling a new vehicle in the United States, the manufacturer must certify that the vehicle complies with all of these standards. *See id.* § 30115(a).

The FMVSS strive to "balance the need to ensure motor vehicle safety with the flexibility to innovate." NHTSA, Preliminary Automated Vehicles Policy at 10 (May 30, 2013), https://tinyurl.com/3c36ubuv. NHTSA promulgates the standards after a formal notice-and-comment rulemaking process that considers the views of consumers, companies, interest groups, experts inside and outside the government, and the

general public. *See, e.g.*, Federal Motor Vehicle Safety Standards; Test Procedures; Reopening of Comment Period, 86 Fed. Reg. 13,684 (Mar. 10, 2021). Whether developing a new standard or revising an existing one, NHTSA evaluates a range of factors, including potential safety benefits, costs, design implications, and technological feasibility.

Compliance with FMVSS is not mere lip service. Most standards require automotive manufacturers to perform extensive testing. For example, FMVSS 208 sets standards for protecting occupants in a frontal crash and provides detailed procedures for conducting frontal, lateral, and rollover tests. *See* 49 C.F.R. § 571.208(8). The standard that applies to headrests, FMVSS 202a, similarly imposes detailed testing procedures, which were developed by a trade organization called the Society of Automotive Engineers. *Id.* § 571.202a.

Each safety standard operates independently from the others. Whether a vehicle component complies (or does not comply) with a particular standard does not necessarily shed light on whether a different vehicle component complies (or does not comply) with a different standard. For example, FMVSS 102 governs transmission shift position sequence and requires, among other things, that a "neutral position shall be located between forward drive and reverse drive positions." 49 C.F.R. § 571.102(3)(1). Another standard, FMVSS 207, requires seats to withstand at least "20 times the mass of the seat in kilograms multiplied by 9.8 applied in a rearward longitudinal direction." *Id.* § 571.207(4)(2)(b). That a vehicle's gear shift complies with FMVSS 102 says nothing about whether that same vehicle's seats comply with FMVSS 207. Likewise, a recall of one component (e.g., a

door) says nothing about whether another component (e.g., a seat) complies with the applicable FMVSS.

Governmental standards for drugs, medical devices, and other products are similarly research-based and reflect the informed views of experts. It therefore makes sense for legislatures to acknowledge "the important role of governmental standards" and to codify a presumption of non-defectiveness for products that comply with them. *Grundberg v. Upjohn Co.*, 813 P.2d 89, 97 (Utah 1991).

B. The Decision Below Transforms The Statutory Presumption From A Shield For Manufacturers Into A Sword For Plaintiffs.

Although the Legislature enacted the statutory presumption to benefit manufacturers, the presumption is not absolute. Like all presumptions, it is rebuttable if a plaintiff can prove "that the nonexistence of *the presumed fact* is more probable than its existence." Wis. Stat. § 903.01 (emphasis added). Thus, a plaintiff can rebut the presumption only with evidence that *the product* is defective. Evidence that some *other product* is defective will not do. Courts construing similar statutory presumptions widely agree that evidence of unrelated products cannot rebut the presumption. *See* Pet. 19-20 (citing cases).

Despite this clear statutory text and agreement among courts across the country, the trial court in this case allowed the plaintiffs to "rebut" the presumption with evidence of 85 voluntary recalls unrelated to the driver's seat in the 2013 Elantra. The court of appeals affirmed, reasoning that the evidence of unrelated recalls had "some probative value." P.App.46, ¶90.

That reasoning makes no sense. Whether one vehicle component is defective says nothing about whether another vehicle component is

also defective. A problem with an airbag does not indicate a problem with the driver's seat.

By admitting evidence of unrelated voluntary recalls in response to Hyundai's decision to invoke the statutory presumption, the trial court transformed the presumption into a poison pill for manufacturers. As a result of this transformation, any manufacturer that invokes the presumption opens the door for plaintiffs to parade before the jury inflammatory evidence of any past recall of any product ever made by the manufacturer (or even a sister company).

Left to stand, the decision below would effectively make the statutory presumption unavailable to automotive manufacturers. None would risk invoking it. Voluntary recalls are common in the industry, reflecting the complex nature of modern-day automobiles. *See, e.g.*, *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 251, 872 A.2d 783, 794 (2005) ("Defects can, and do, arise with complex instrumentalities such as automobiles."). Vehicle manufacturers must innovate to survive. They constantly explore new ways to improve gas mileage, performance, safety, and other design elements. Being the first to offer a new technology is one way to stand out from the competition.

This persistent pressure to innovate an incredibly complex product—vehicles have more than 30,000 parts—means that recalls are inevitable. Indeed, there have been more than 15,000 automotive recalls in the past 20 years, including more than 1,000 in 2021 alone. *See* NHTSA, 2021 Recall Annual Report (Feb. 2022), *available at* https://tinyurl.com/2xmzvesc. Every major automotive company has issued a recall.

Recalls are not unique to the automotive industry. The FDA oversees hundreds of drug-related recalls each year. *See* FDA, Recalls, Market Withdrawals, & Safety Alerts, https://tinyurl.com/3j3s8642 (last visited Dec. 8, 2022). Hundreds of other products have been recalled recently, including snowmobiles, children's toys, surge protectors, unicycle batteries, baby strollers, exercise bicycles, and even air fresheners. *See* Consumer Product Safety Commission, Recalls, https://www.cpsc.gov/Recalls (last visited Dec. 8, 2022).

Under the reasoning of the court below, each of these recalls would be forever admissible in a future product liability lawsuit against the manufacturer regardless of which one of its products is at issue. Companies that comply with governmental safety standards would risk permanently losing the benefit of the statutory presumption if *any* of their products are *ever* recalled. Recalls would be enduring scarlet letters in Wisconsin.

This result is particularly perverse because most recalls—like *all* 85 admitted in this case—are voluntary, meaning the manufacturer chooses to recall a product without a governmental mandate. Allowing plaintiffs to use voluntary recalls as evidence *against* the manufacturer would discourage manufacturers from proactively protecting consumers after discovering a defect. But the Legislature has codified rules—including in the same statute creating the presumption—that adopt the exact opposite incentive structure. *See* Wis. Stat. §§ 895.047(4), 904.07. To encourage manufacturers to fix problems with their products, these rules generally prohibit plaintiffs from introducing evidence of subsequent remedial measures to support a strict liability or negligence claim. Courts should construe section 895.047(3)(b) consistent with this

legislative purpose, encouraging voluntary recalls whenever a manufacturer discovers a problem instead of punishing the manufacturer for doing the right thing.

Allowing plaintiffs to "rebut" the statutory presumption with evidence of unrelated recalls also conflicts with the longstanding rule that "[e]vidence of other accidents may be admissible in a products liability case to show the probability of the defect in question" but *only* "where the accidents occurred under conditions and circumstances similar to those of the accident which injured the plaintiff." *Farrell v. John Deere Co.*, 151 Wis. 2d 45, 76, 443 N.W.2d 50, 61 (Ct. App. 1989). Unless the Court intervenes, section 895.047(3)(b) will now be an end-run around this rule, empowering plaintiffs to introduce unrelated evidence of problems with different products under the guise of "rebutting" the presumption of non-defectiveness.

Wisconsin is not the only state that requires a similarity analysis before admitting evidence of problems with different products. Courts widely agree that recall evidence is irrelevant unless it concerns the *particular product* at issue. That is because a defendant "will be unfairly prejudiced and the jury confused or mislead if the plaintiff is permitted to parade before the jury evidence of a product recall . . . of a different product." *Verzwyvelt v. St. Paul Fire & Marine Ins. Co.*, 175 F. Supp. 2d 881, 888-89 (W.D. La. 2001); *see also Jordan v. Gen. Motors Corp.*, 624 F. Supp. 72, 77 (E.D. La. 1985) (excluding evidence of a "distinctly different" defect than the one "alleged in this case").

The Court should grant review to get Wisconsin law back on track with the language of the statute and the uniform approach of other states

that exclude irrelevant, inflammatory, and unfairly prejudicial evidence of unrelated recalls.

II. The Court Should Clarify When, If Ever, Untested Expert Theories Are Admissible.

As a complement to the statutory presumption of non-defectiveness, the Omnibus Tort Reform Act also codified the *Daubert* admissibility standards for expert testimony. *See* Wis. Stat. § 907.02. The court of appeals shirked these statutory requirements too.

The "heightened standard" in section 907.02 did not change the judicial gatekeeping function but instead "require[s] more of the gatekeeper." *In re Commitment of Jones*, 2018 WI 44, ¶32, 381 Wis. 2d 284, 911 N.W.2d 97. "Instead of simply determining whether the evidence makes a fact of consequence more or less probable, courts *must* now also make a threshold determination as to whether the evidence is reliable enough to go to the factfinder." *Id*. (emphasis added).

A "key question" in this reliability inquiry is whether the expert's opinions can be and have been tested. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993). The "testing factor [is] *Daubert*'s most significant guidepost." Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 242 (2006) (quotation marks omitted). As gatekeepers, judges must "keep theories out of the courtroom unless and until the expert's hypothesis is tested." *Id.* at 244.

Consistent with *Daubert*, proposed experts must be "qualified" *and* offer opinions that are "the product of reliable principles and methods." Wis. Stat. § 907.02(1). The trial court improperly conflated these inquiries. For example, when discussing the "reliability" of Dr. Saczalski's opinions, the court reasoned that it had "listened to his

mathematical analysis, his experience and training," P.App.0121, and found that his testimony was "not a subjective belief by unsupported speculation," P.App.0122. But whether Dr. Saczalski has relevant experience and training, or is otherwise *qualified* to offer opinion testimony, does not necessarily mean those opinions are *reliable*, especially because he did not test them.

In *Oddi v. Ford Motor Co.*, 234 F.3d 136 (3d Cir. 2000), the Third Circuit applied *Daubert* and affirmed a trial court's decision to exclude an expert engineer who met *Daubert*'s "qualifications requirement" but who "fail[ed] to test" his hypothesis about a vehicle defect, which meant "no 'gatekeeper' [could] assess the relationship of [the expert's] method to other methods known to be reliable." *Id.* at 156-58. The court in *Booth v. Black & Decker*, 166 F. Supp. 2d 215 (E.D. Pa. 2001), similarly excluded a qualified expert who offered opinions "based on his own training and experience," not testing or another "objective anchor." *Id.* at 221. And this Court has explained 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.

Cases like *Oddi*, *Booth*, and *Daniel R.S.* are tough to square with the decision below. Rather than analyze whether Dr. Saczalaski's theories were reliable, the court of appeals invoked his credentials and reasoned that his lack of testing was mere "grist for the mill on cross-examination." P.App.37, ¶68. The court used similar reasoning when evaluating the opinions of Dr. Kurpad, starting and ending the *Daubert* inquiry with a review of his qualifications. *See* Pet. 26-27.

The Court should grant review to clarify that whether an expert is *qualified* is a separate inquiry from whether the expert's opinions are *reliable*. The failure of Dr. Saczalski to test his theories was not merely a matter for cross-examination; it was confirmation that his opinions are unreliable and should have been excluded under section 907.02.

CONCLUSION

The Court should grant the petition for review.

Dated this 9th day of December, 2022.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE
WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c). The length of this brief is 2,962 words.

Electronically signed by Douglas M. Poland

Douglas M. Poland

CERTIFICATION OF COMPLIANCE WITH S. CT. ORDER 19-02B AND 20-07B, 2022 WI 62, APPENDIX A, SECTION 6.A.7 (FORMER § 809.19(12)(f))

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of S. Ct. Order 19-02B and 20-07B, 2022 WI 62, Appendix, Section 6.A.7 (former Wis. Stat. § 809.19(12)(f)).

I further certify that:

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

A copy of this certificate has been served along with the paper copies of this brief filed with the court and sent to all parties.

Dated this 9th day of December, 2022.

Electronically signed by Douglas M. Poland

Douglas M. Poland

CERTIFICATION OF FILING AND SERVICE

I certify that an original and 22 copies of the foregoing Brief of *Amicus Curiae* FCA US LLC, were hand-delivered to the Clerk of the Supreme Court on December 9, 2022.

I further certify that on December 9, 2022, I caused true and correct copies of the foregoing Brief of *Amicus Curiae* FCA US LLC, to be served on counsel of record for the parties by first-class U.S. mail, postage prepaid.

Electronically signed by Douglas M. Poland

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