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

NON-PARTY BRIEF OF *AMICUS CURIAE* WISCONSIN LEGISLATURE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Wisconsin Legislature enacted 2011 Act 2 in order to revise the state's liability laws and bring them into alignment with other states and the federal government. In part, the Legislature's goals were to create a more business friendly environment while protecting citizens from defective products, as well as to have a more uniform and higher standard for expert testimony.

Unfortunately, lower courts have misapplied Act 2, rendering it ineffective. The Legislature, as a representative body of Wisconsin's citizens, has an interest in ensuring its laws remain enforced as written. For Act 2, this means properly applying the plain language of the statute, which is supported by ample history.

INTRODUCTION

Before 2011, businesses in Wisconsin faced a treacherous litigation landscape. If a business recalled a product to keep customers safe, that could be used as evidence against the company, creating a perverse incentive to leave potentially dangerous products on the market. Similarly, if a business updated its products to make them safer, those updates might be used against them in court. The state also had a very low threshold for expert testimony, which caused an uneven and unpredictable standard for what kind of evidence would be admissible in trials.

To remedy these problems, the Legislature passed 2011 Act 2. Among other things, the Act clearly stated how and when evidence regarding recalls could be entered at trial, explained that a reasonable alternative design must have existed at the time the product at issue was sold to be used as evidence of subsequent remedial measures, and clarified the standards for expert testimony. These changes brought Wisconsin into line with numerous other states and the federal standards.

Unfortunately, the decisions below have ignored the plain meaning of Act 2, rendering the legislation ineffective. This Court should grant review and restore the will of Wisconsin's citizens as enacted over a decade ago through the Legislature.

ARGUMENT

I. Wisconsin Statutes Sections 895.047(3)(b) and 895.047(4) Revolutionized State Law On Products Liability To Create A Safe And "Healthy Business Environment" In Wisconsin

As part of the 2011 tort-reform law, the Wisconsin Legislature enacted Wis. Stat. § 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 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 also enacted Wis. Stat. § 895.047(4), providing 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 so long as that alternative design "existed at the time that the product was sold." These provisions, among others, were the culmination of more than a decade of legislative work in support of tort reform.

A. 2011 Wisconsin Act 2 Overturned More Than Forty Years of Products Liability Precedent

In passing Act 2, the Legislature was reacting to outdated judicial precedent and legal concepts that threatened our State's economic and safety interests. *See Strenke v. Hogner*, 2005 WI 25, ¶ 28, 279 Wis. 2d 52, 66, 694 N.W.2d 296, 302 ("The 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."). In particular, Wisconsin had been operating under the same design-defect precedent for more than forty years. *See Horst v. Deere & Co.*, 319 Wis.2d 147, 769 N.W.2d 536, 2009 WI 75 ¶ 85 (recognizing "forty-two years of precedent" in "design defect cases"). That changed in 1997 when the American Law Institute "overhaul[ed]" the law of products liability by adopting the Restatement (Third) of Torts. *Godoy ex rel. Gramling v. E.I. du Pont de Nemours and Co.*, 319 Wis.2d 91, 768 N.W.2d 674, 2009 WI 78, ¶ 87 (Prosser, J., dissenting). This is the same year that the Legislature first proposed the relevant statutes.

Act 2 rebalanced tort laws so businesses and citizens had reasonable standards by which to judge potentially defective products. *See Green v. Smith & Nephew AHP, Inc.*, 245 Wis.2d 772, 629 N.W.2d 727, 2001 WI 109, ¶132 (Sykes, J., dissenting) ("[W]e must have some principled standards by which to evaluate product defectiveness in design and warning defect cases; otherwise strict liability will become absolute liability."). The Legislature reacted in part to a specific case, mentioned in the legislative history, *Thomas v. Mallett*, 2005 WI 129. *See* Drafting Files, 2011 Wis. Act 2, at 7.[1] There, the Court held that a manufacturer of white lead carbonate could be liable for the injuries to a child who had ingested paint containing the substance even if the child could not prove that a particular manufacturer produced the substance. In relevant part, the Legislature passed Act 2 to focus courts on "the

[1] https://docs.legis.wisconsin.gov/2011/related/drafting_files/wisconsin_acts/2011_act_002_sb_1_jr1/01_11act_002/11act_002enrolling.pdf.

time period in which *that specific product* was manufactured, distributed, sold, or promoted." *Id.* at 7–8 (emphasis added).

Before the 2011 reforms, Wisconsin was an outlier in tort law. *See* Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 729 (2006) (recognizing that the "Wisconsin Supreme Court" became "the first court in the nation to allow" the claims in *Thomas v. Mallett* "to go forward"). Act 2 aligned Wisconsin with other states and the latest Restatement of Torts. *See Horst v. Deere & Co.*, 319 Wis.2d 147, 769 N.W.2d 536, 2009 WI 75, ¶¶ 87–103 (Gableman, J., concurring) (explaining the old framework for design defect cases and advocating for a new framework, under Restatement (Third) of Torts, where the plaintiffs would have "to prove that a *reasonable alternative design was available at the time*") (emphasis added) (citing Restatement (Third) Torts § 2(b) cmt. a). *See also Godoy ex rel. Gramling v. E.I. du Pont de Nemours and Co.*, 319 Wis.2d 91, 768 N.W.2d 674, 2009 WI 78, ¶¶ 82–106 (Prosser, J., dissenting) (explaining development of product liability law under the Restatement). In 1997, the same year that Wisconsin first proposed the relevant revisions, *see supra*, the Restatement (Third) of Torts: Product Liability "overhaul[ed]" the law. *Id.* ¶ 87.

B. The Legislature Intended To Create A More Favorable Economic Climate While Also Promoting Safety And Accountability Relating To Product Designs

The Court should look no further than the plain language of Act 2 to determine the Legislature's intent as, "…[its] intent is expressed in the statutory language." *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The legislative history completely dispels any potential ambiguity. *Teschendorf v. State Farm Ins. Co.,* 2006 WI 89, ¶14, 293 Wis. 2d 123, 717 N.W.2d 258. ("[I]f the meaning of the statute is plain, we sometimes look to legislative history to confirm the plain meaning.")

The statutory language for Wisconsin Statutes 895.047(3)(b) and (4) first appeared in 1997 Assembly Bill 884 § 895.047. *See* Drafting Files, 1999 Assembly Bill 884.[2] As explained at the time, this "bill creates specific conditions that must be followed when a person seeks damages for an injury caused by a manufactured product." *Id.* at 10. "Under the bill, the manufacturer is not liable for a person's injury caused by a manufactured product if the product complied with standards or conditions adopted or approved by a federal or state agency." *Id.* (proposing then § 805.047(2)(a)).

This reasoning appeared again in 1999. *Id.* In addition to what had already been stated in the 1997 bill, the Legislature

[2] https://docs.legis.wisconsin.gov/1999/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/1999_ab_884/1_ab_884/99_2270df.pdf.

added that, "[u]nder this bill, a manufacturer is liable for damages caused by the manufacturer's product if the injured claimant proves that . . . the defective condition existed at the time that the product left the control of the manufacturer." *Id.* at 33, The Legislature then proposed Section 805.047(4). *Id.* at 36. The language was also in 2003 Assembly Bill 317.[3] *See also* 2003 Senate Bill 126.[4] Next, it was in 2005 Assembly Bill 101.[5] *See also* 2005 Senate Bill 58.[6] Then it appeared again in 2007 Assembly Bill 147.[7] *See also* 2007 Senate Bill 59.[8]

In addition to the text, shortly before the bill was signed into law, the Committee on Judiciary and Ethics heard 10 hours of testimony on January 11, 2011.[9] *See Testimony, Assembly and Senate Committees on Judiciary*, Wisconsin Eye (Jan. 11, 2011).[10] This hearing provided ample evidence that the Legislature intended to create an environment more favorable to job creators.

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[3] https://docs.legis.wisconsin.gov/2003/related/proposals/ab317/2/_13.

[4] https://docs.legis.wisconsin.gov/2003/related/proposals/sb126/2/_13.

[5] https://docs.legis.wisconsin.gov/2005/related/proposals/ab101/2/_13.

[6] https://docs.legis.wisconsin.gov/2005/related/proposals/sb58/2/_13.

[7] https://docs.legis.wisconsin.gov/2007/related/proposals/ab147/2/_13.

[8] https://docs.legis.wisconsin.gov/2007/related/proposals/sb59/2/_13.

[9] Wisconsin Assembly, Record of Committee Proceedings, https://docs.legis.wisconsin.gov/2011/related/records/jr1_ab1/ajud_0118 2011.pdf (listing appearances for all attendees, including those for and against the bill).

[10] https://wiseye.org/2011/01/11/assembly-and-senate-committees-on-judiciary/.

For example, the Wisconsin Defense Council explained the purpose of the "subsequent remedial measures" provision. *See id.* at 1:55:00–1:56:35. WDC testified most states do not allow subsequent remedial measures to prove a defect. *Id*. This creates "an environment" where businesses are "encouraged to take steps" to improve "safety." *Id*. "The statute should" thus "encourage implementation of safety features." *Id*. Those remedial measures aren't totally out of a case, however, and can be used only "to prove a reasonable alternative design that *existed at the time*." *Id*. (emphasis added).

James Buchen of Wisconsin Manufacturers & Commerce also testified that the two bills were aimed at "improving the business climate in our state," *Id.* at 6:05:00-6:07:00. Specifically, the bills were intended to "create environment where employers create jobs" and Wisconsin's "costs aren't higher here than your competitor in Indiana or Texas." *Id.* at 6:08:00-6:09:00. He further testified that the bills would "modernize" products liability law and "bring [Wisconsin] into line with [46] other states." *Id.* at 6:10:00-6:11:30.

Governor Walker signed the bill into law on January 27, 2011. As he explained during the signing, this Act changed the "litigation climate" in Wisconsin for businesses. Governor Walker Signs Tort Reform Legislation, Wisconsin Eye (January 27, 2011), at 3:40–50.[11] The Governor stated the Act, "cut[s] back on frivolous

[11] https://wiseye.org/2011/01/27/governor-walker-signs-tort-reform-legislation/.

lawsuits and out of control lawsuit abuse" against job creators. *Id.* at 4:40–45. The Act also makes it "more affordable" through "lower litigation costs" to do business in Wisconsin. *Id.* at 4:50–5:00. Act 2 was published into law on January 31, 2011.[12]

The Act received widespread support from diverse groups and the statutes have remained largely the same since.[13]

II. Wisconsin Statutes Section 907.02 "Transform[ed] Wisconsin Law So That It Now Adheres To Federal Rule 702's Heightened Standard"

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

[12] https://docs.legis.wisconsin.gov/2011/proposals/jr1/sb1.

[13] Legislative Efforts, WI Lobbying, https://lobbying.wi.gov/What/BillInformation/2011REG/Information/7908 (listing proponents such as Associated Builders and Contractors of Wisconsin, Dairy Business Association, Midwest Food Processors Association, Inc., SSM Health Care of Wisconsin, Wisconsin Academy of Family Physicians, Wisconsin Economic Development Association, and many more); *see also* Wisconsin Assembly, Record of Committee Proceedings, https://docs.legis.wisconsin.gov/2011/related/records/jr1_ab1/ajud_0118 2011.pdf.

44, ¶ 7, 381 Wis. 2d 284, 911 N.W.2d 97. In doing so, Section 907.02 "transform[ed] Wisconsin law" to adhere to the federal rules. *Seifert v. Balink*, 2017 WI 2 ¶ 174 (Ziegler, J., concurring).

A. Case Law Before 2011 Recognized A "Low Threshold" for Expert Testimony

"The Wisconsin legislature's adoption of the *Daubert* standard was part of a larger seemingly legislative reaction to Wisconsin Supreme Court decisions." *Seifert v. Balink*, 2017 WI 2 ¶ 174 (Ziegler, J., concurring). Under the previous standard for expert testimony, "questions of the weight and reliability of relevant evidence [were] matters for the trier of fact." *State v. Fischer*, 2010 WI 6, ¶ 7, 322 Wis. 2d 265, 778 N.W.2d 629. "[E]xpert testimony [was] generally admissible in the circuit court's discretion if the witness [was] qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." *State v. Kandutsch*, 2011 WI 78, ¶ 26, 336 Wis.2d 478, 799 N.W.2d 865. This was a "low threshold." *State v. Shomberg*, 2006 WI 9, ¶ 67, 288 Wis. 2d 1, 709 N.W.2d 370 (Butler, J., dissenting).

As Justice Ziegler explained, prior to Act 2, the "standard of admissibility of expert evidence" in Wisconsin "was considerably more accommodating than either the *Frye* test or Rule 702's standards." *Seifert v. Balink*, 2017 WI 2 ¶ 174 (Ziegler, J., concurring) (citing *Frye v. United States*, 293 F.3 1013 (D.C. Cir. 1923), *superseded in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.

579 (1993), and Federal Rules of Evidence 702). With the enactment of Act 2, Wisconsin's low threshold for expert testimony came into line with the federal standard.

B. The Legislature Intended To Put An End to "The Days Of Relatively Easy Admission Of Expert Testimony Into Wisconsin Courtrooms"

The legislative history to Wis. Stat. § 907.02 demonstrates that the "trial courts' gatekeeping function [would] change[]" from prior case law. *Seifert v. Balink*, 2017 WI 2 ¶ 174 (Ziegler, J., concurring). "The days of relatively easy admission of expert testimony into Wisconsin courtrooms [were] over" after the Legislature enacted this provision. *Id.*

As with other sections of the bills, there is ample history to support the Legislature's intent. The first version of Section 907.02 appeared in 2003 Senate Bill 49.[14] It was next in 2005 Assembly Bill 278.[15] As explained then, "[t]his bill limits the testimony of an expert witness to testimony that is based on sufficient facts or data, that is the product of reliable principles and methods, and that is based on the witness applying those principles and methods to the facts of the case." *Id.* at 3. The bill language appeared again

[14] https://docs.legis.wisconsin.gov/2003/related/drafting_files/senate_intro_legislation/senate_bills_not_enacted/2003_sb_0049_vetoed_in_full/01_sb_49_enrolling/03_0671_en.pdf.

[15] https://docs.legis.wisconsin.gov/2005/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2005_ab_0278/01_ab_278/05_2525_1.pdf.

in 2007 Assembly Bill 121.[16] *See also* 2007 Senate Bill 60.[17] Finally, the language was in 2011 Assembly Bill 1.[18]

The Legislature knew the impact of the language. An analysis by the Legislative Reference Bureau accompanying Act 2 alerted legislators to what the proposed law would accomplish once passed.[19] LRB wrote, "Current law allows the testimony of an expert witness if that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue in the case. This bill limits the testimony of an expert witness to testimony that is based on sufficient facts or data, that is the product of reliable principles and methods, and that is based on the witness applying those principles and methods to the facts of the case." *Id*. at 9. Further, "[t]his bill adds that facts or data that are otherwise inadmissible may not be disclosed to the jury unless the court determines that their value in assisting the jury to evaluate the expert's testimony outweighs their prejudicial effect." *Id*.

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[16] https://docs.legis.wisconsin.gov/2007/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2007_ab_0121/01_ab_121/07_1895_1.pdf.

[17] https://docs.legis.wisconsin.gov/2007/related/drafting_files/senate_intro_legislation/senate_bills_not_enacted/2007_sb_060/01_sb_60/07_1322_1.pdf.

[18] https://docs.legis.wisconsin.gov/2011/related/drafting_files/assembly_intro_legislation/assembly_special_session/2011_01_04_ab_0001_jr1/01_ab_1_jr1/11_0831_1.pdf.

[19] https://docs.legis.wisconsin.gov/2011/related/proposals/jr1_ab1.pdf.

As with the other sections of the bills, the Committee on Judiciary and Ethics heard 10 hours of testimony on January 11, 2011.[20]

Many experts in the field testified in favor of the bill. For example, the Wisconsin Civil Justice Council, Inc. stated that the bill "[a]dopt[s] sound science principles relating to expert opinion evidence. Wisconsin is currently one of only 14 states that have rejected the *Daubert* principles that require expert testimony be reliable."[21] Further, before the bill passed, "Wisconsin [was] the only Midwest state to reject *Daubert*, which means Wisconsin state courts [did] not require expert testimony to be reliable." *Id*. "Under this bill and *Daubert*, reliable means the opinion is 'based upon sufficient facts or data' and is 'the product of reliable principles and methods.'" *Id*.

The American Tort Reform Association also testified at the hearing.[22] As it explained, "Wisconsin stands alone" for its expert testimony. *Id*. at 3:15:00–3:18:00. The Association also described the impact of *Daubert* in Delaware. After that state adopted *Daubert*, there were "higher quality experts," "judges took a more active

[20] https://wiseye.org/2011/01/11/assembly-and-senate-committees-on-judiciary/.

[21] https://www.wisciviljusticecouncil.org/wwcms/wp-content/uploads/2011/01/wcjc_11Jan11-memo-support-civil-justice-reform.pdf.

[22] https://wiseye.org/2011/01/11/assembly-and-senate-committees-on-judiciary/.

role in judges evaluating reliability," "weak cases" were screened out, and more settlements were reached. *Id.* at 3:18:00–3:19:30.

Judge Michael Brennan, speaking for himself and his law firm, testified in favor of the bills with a compelling example. He stated Wisconsin was in the "distinct minority of using relevance" and "let everything in." 5:16:41-5:17:00. Brennan discussed an older Wisconsin case, *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959), in which "deficient science" was allowed into testimony. *Id.* at 5:21:40. In *Puhl*, a 12-weeks pregnant woman was involved in a car accident. Her child was then born with Down syndrome. The jury heard "expert" testimony from plaintiff's doctor who stated that the car accident caused Down syndrome. The jury then found for the plaintiff. This Court found there was no link, and a year later medical science confirmed that trauma does not cause Down syndrome. *Id.* at 5:21:00-5:22:00. The *Puhl* case demonstrated that Wisconsin was allowing "deficient science" before a jury. Judge Brennan explained that we must trust judges as gatekeepers to prevent junk science from coming before factfinders. *Id.* at 5:23:00-5:24:00.

In the press conference associated with the signing, Governor Walker specifically addressed the changes to expert testimony codified in the legislation. It's "a greater benefit" for everyone that the statute prevents counsel from using witnesses who are not actually experts in their field. Governor Walker Signs Tort Reform Legislation, at 9:33–10:20.

These examples illustrate that in addition to the plain language of Act 2, there is no doubt regarding the Legislature's intent.

CONCLUSION

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

Dated: December 9, 2022

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,995 words.

Dated: December 9, 2022

JESSIE AUGUSTYN

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

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 with the paper copies of this brief filed with the court and served on all parties.

Dated:

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2022 I caused true copies of the foregoing brief to be served upon counsel of record via U.S. Mail, first-class postage, addressed as follows:

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