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SUPREME COURT

No. 2020-AP-1052

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.

Review of a Decision of the Court of Appeals, District II
On Appeal from the Racine County Circuit Court,
The Honorable Eugene A. Gasiorkiewicz, Presiding.
Circuit Court Case No. 16-CV-1096

BRIEF OF *AMICUS CURIAE* ALLIANCE FOR AUTOMOTIVE INNOVATION IN SUPPORT OF THE PETITION FOR REVIEW

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INTEREST OF *AMICUS CURIAE*

Amicus is the Alliance for Automotive Innovation (AAI), which represents virtually the entire automotive industry. Its members include automobile manufacturers that make nearly 99% of all the new cars and light trucks sold in the United States. Its members also include key suppliers to the automotive industry, such as manufacturers of automotive parts and components. AAI's members have an interest in ensuring that allegations of design defect under Wisconsin's tort law are supported by reliable expert evidence and are untainted by admissions of other improper evidence, so that liability determinations are fair, follow traditional principles, and reflect sound public policy.

INTRODUCTION

This is an important case for the Court's review because it presents the Court with the opportunity to address several evidentiary issues important to design defect determinations in Wisconsin. Here, the trial court committed a series of evidentiary errors that allowed the jury to be presented with a false or misleading narrative, leading to a $38 million verdict despite the fact the design of the headrest at issue met Federal Motor Vehicle Safety Standards (FMVSS) and, therefore, was a presumptively reasonable design under Wisconsin law. There is no doubt that this was a horrific collision; Mr. Vanderventer was driving his Hyundai Elantra when he was slowing to turn and a teenager rear-ended him at more than 40 miles per hour. He suffered severe debilitating injuries. Even in such difficult situations, Wisconsin residents and companies doing business here must be able to rely on the State's courts to follow sound evidentiary principles in the pursuit of justice.

The ability of courts to generate proper civil liability outcomes, particularly in automobile cases involving plaintiffs like Mr. Vanderventer, has long been identified as a problem, both nationally and in Wisconsin. *See* Ellen M. Bublick, *The Tort–Proof Plaintiff: The Drunk in the Automobile, Crashworthiness Claims, and the Restatement (Third) of Torts*, 74 Brook. L. Rev. 707, 707 (2009) ("State

courts face a difficult challenge when they review crashworthiness claims that arise in conjunction with drunk driving."). Some courts, particularly when the plaintiff's injuries are severe, as here, have failed to act as proper gatekeepers of science in their courtrooms, ignoring standards controlling admission of expert testimonies. *See id.* They have allowed novel or unsubstantiated opinions to facilitate recovery, leaving the automobile manufacturer to pay the at-fault party's liability. *See* 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, 220-26 (2006).

In 2011, the Wisconsin State Legislature, in response to these and other liability trends, enacted legislation aimed at assuring the public that product liability cases, including those involving automobile crashes, would reach sound results. *See* Omnibus Tort Reform Act, 2011 Wis. Act 2. Among other things, it created a rebuttable presumption that products—such as the headrest at issue here—that comply with federal or state safety standards are not defective. *See* Wis. Stat. § 895.047(3)(b). Further, a design cannot be deemed defective in the abstract; there must have been a reasonable alternative design available to the manufacturer. *See* Wis. Stat. § 895.047(1)(a). And, it clarified that courts were to act as gatekeepers of expert evidence to assure that juries make decisions based only on sound engineering, medical and other types of scientific testimony. *See* Wis. Stat. § 907.02. The Legislature wanted to ensure that juries would be presented only with credible information so their decisions would be well-grounded in the facts.

The courts below openly side-stepped each of these provisions—and, worse, turned them on their heads. The result was the exact situation the Legislature sought to prevent: the jury heard a highly prejudicial, inaccurate picture of the facts. First, Plaintiffs' expert never tested or replicated his theory for how the head restraint moved to cause Mr. Vanderventer's injury, but was allowed to show the jury a seat manually re-welded into the position he claimed occurred. Such fictitious, in-court visuals can be highly prejudicial. Second, rather than show an alternative design that existed in real life when the car was sold, Plaintiffs' expert was allowed to theorize

that such a design was possible. Third, the court turned these shields into swords, invoking them to allow irrelevant, highly prejudicial evidence including scores of unrelated recalls for components and vehicles not at issue and designs of head restraints used years later that have nothing to do with whether this head restraint was defective. Finally, instead of being a gatekeeper of expert evidence, the court allowed Plaintiffs' experts to testify outside their areas of expertise. In affirming the lower court's ruling, the Court of Appeals repeatedly stated that it deferred to the trial court's discretion and offered statutory interpretations that strain credibility. It did not, as it was required to do, apply the 2011 reforms as written and intended.

Amicus urges the Court to grant review to ensure that Wisconsin courts adhere to Wisconsin law, including the 2011 reforms even though it removed some of the courts' discretion. The Legislature purposefully put limits on admissibility of evidence to protect the State's courts, the litigants and public from verdicts, like here, that are not grounded in credible facts. Those limits must be enforced.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT VEHICLE DESIGN DEFECT CLAIMS MUST BE SUPPORTED BY RELIABLE EVIDENCE.

In Wisconsin, any claim that a regulated product was defectively designed must be adjudicated within the context of the applicable regulatory regime. The Legislature has provided that a product is presumptively non-defective if it complies with these standards. *See* Wis. Stat. § 895.047(3)(b). This provision makes sense, particularly as it applies to allegations such as the one here that an automobile part is defective. The automotive parts and systems in Mr. Vanderventer's Hyundai Elantra, including the head restraint at issue, are governed by a detailed federal regulatory regime under the National Traffic and Motor Vehicle Safety Act[1] and

[1] 49 U.S.C. §§ 30101-30183.

FMVSS promulgated under that Act. This entire regulatory regime is predicated on objective, repeatable testing to provide reasonable assurances of safety.

Today, there are standards that govern nearly every aspect of a car's design, from the location, spacing and assembly of vehicle components and systems, *see* FMVSS Nos. 201-204, to door locks, seat belts and child restraint systems, *see* FMVSS Nos. 206-10, 213, to glazing materials for windows, *see* FMVSS No. 205. Each safety standard is buttressed by test procedures, many of which are codified in the same rule alongside the safety standard. *See* 49 C.F.R. pt. 571. In addition, the National Highway Traffic Safety Administration (NHTSA) conducts vehicle crash and rollover tests to evaluate these designs in collisions. *See History of Car Safety*, crashtest.org.[2] Each year, NHTSA oversees 90 to 125 tests on high-volume models that are new or significantly updated. *See* Nick Kurczewski, *NHTSA and IIHS Crash Test Safety Ratings Explained*, Car & Driver (Feb. 27, 2021).[3]

With respect to head restraints, NHTSA has had standards in place for more than a half century. *See* 36 Fed. Reg. 22,902, 22,943 (Dec. 2, 1971). NHTSA adopted FMVSS No. 202 to "reduce the frequency and severity of neck injury in rear-end and other collisions." *Id.* 22,943-44. The initial standard specified the location of, and allowable measurements for, an adjustable head restraint, as well as various testing requirements. *See id.* Like other safety regulations, FMVSS No. 202 has been amended multiple times to establish a comprehensive, stringent set of requirements. The current standard establishes precise requirements for location and permissible dimensions of a head restraint, which vary by vehicle type. *See* 49 C.F.R. § 571.202a. It also addresses allowable gaps within a head restraint, removability, retraction for non-use positions, and head restraint strength and energy absorption requirements, among other safety considerations. *See id.*

[2] https://www.crashtest.org/history-car-safety/

[3] https://www.caranddriver.com/features/g35634275/what-to-know-about-the-wrecks-behind-the-ratings-feature/

FMVSS No. 202 also details procedures for testing as the primary basis for demonstrating compliance with its regulations, including for measuring head restraint strength, energy absorption, and displacement. *See id.* It addresses elements of crash testing, from specifications of the testing platform to the exact positioning of a test dummy. *See id.* These testing standards are continually updated. *See* U.S. Dep't of Transp., NHTSA Off. of Vehicle Safety Compliance, *Laboratory Test Procedure for FMVSS No. 202aD—Head Restraints—Dynamic Testing* (Jan. 7, 2011)[4] (providing guidance for new testing procedures); U.S. Dep't of Transp., FMVSS; Head Restraints, RIN 2127-AH09, at 100[5] (indicating the agency is committed to refine testing procedures as technology develops). By complying with these standards and procedures, the head restraint here earned its rebuttable presumption that it was not defectively designed.

By contrast, Plaintiffs' biomechanical engineer expert offered only a bare hypothesis for how the Elantra's head restraint performed in this collision. His causation theory was fully capable of testing, but he chose not to conduct a single crash test using a similar seat from a similar car with a crash-test dummy of similar size to Mr. Vanderventer to show that the head restraint could move in the way he suggested. R.1763:241; R.1765:87. Instead, he manually reformed and re-welded a seat so the head restraints would match his theory, creating a visual misimpression for the jury of what occurred during the collision. R.1763:147–48; R.1765:103–05. Further, he was allowed to posit that the Elantra's head restraint could have been made stronger, but never showed, as required, that the purported reasonable alternative design existed *at the time of sale*. He merely stated that future versions of head restraints were safer. "Academically, it may be argued that all products are defective because they can be made more safe." *Claytor v. Gen. Motors Corp.*, 286 S.E.2d 129, 132 (S.C. 1982). None of this testimony speaks to the elements of

[4] https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/tp-202ad-00_tag.pdf

[5] https://www.nhtsa.gov/sites/nhtsa.gov/files/fmvss/202FinalRule_0.pdf

Wisconsin product liability law for whether the head restraint in Mr. Vanderventer's car was actually defectively designed.

Context here is important. A finding in court that a part is defectively designed instructs the manufacturer to re-design it. If that conclusion is based on improper scientific testimony or a bare hypothesis an expert theorizes to facilitate paying a plaintiff, then manufacturers will be told to re-design products in ways that may not be safer for the driving or consuming public. Again, this situation was what the 2011 reforms were intended to prevent. This Court should grant review to clarify what evidence under the 2011 reforms is needed to prove a design defect theory where, as here, product safety is premised on extensive pre-market testing and safety design trade-offs. *Cf. Holiday Motor Corp. v. Walters*, 790 S.E.2d 447, 459 (Va. 2016) (rejecting design defect theory because expert "performed no testing").[6]

II. THE COURT SHOULD GRANT REVIEW TO ENSURE STATE COURTS APPLY—NOT UNDERMINE—WISCONSIN LAW.

The lower courts further erred by misapplying the 2011 reforms—rendering them moot or leveraging them to expand, rather than narrow, admissible evidence.

First, the Court of Appeals invoked the rebuttable presumption that a part meeting FMVSS standards are not defectively designed in order to justify allowing evidence of recalls of parts and cars admittedly having nothing to do with this case. Specifically, Plaintiff introduced evidence of 85 recalls involving different vehicles affecting 8.4 million cars over the span of three decades completely unrelated to the head restraint design at issue. P.App.23 ¶ 41. It is axiomatic that such evidence can "improperly sway a jury." Amy Bice Larson & Drew Mast, *Navigating the Phantom "Defect" Claim*, 64 No. 5 DRI For the Defense 31, 35 (May 2022); *see also Fahimian v. BMW of N. Am., LLC*, 2021 WL 4786678, at *1 (C.D. Cal. Aug. 18,

[6] *See also State v. Hogan*, 2021 WI App 24, ¶ 21, 397 Wis. 2d 171, 959 N.W.2d 658 (stating the key to admissibility of expert evidence is "whether the scientific theory or technique on which the expert's conclusions were based was testable (and tested), whether it was subjected to peer review and publication, and whether it was generally accepted in the scientific community.") (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993)).

2021) ("[E]vidence and argument concerning service bulletins or recall campaigns unrelated to Plaintiff's specific year, make, and model vehicle is of little probative value as to the existence of a defect in Plaintiff's vehicles."); *Olson v. Ford Motor Co.*, 410 F. Supp. 2d 869, 875 (D. N.D. 2006) (stating the "probative value [of such evidence] is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading of the jury, and undue delay and waste of time").

The court's rationale for allowing this highly prejudicial information turns the rebuttable presumption on its head. The court acknowledged this information is irrelevant to the question of whether the head restraint here was defective. Rather, it asserted the Legislature's presumption put the issue of whether compliance with FMVSS *in general* makes a product safer, and recall evidence could be used "to show that vehicles which comply with FMVSS could nonetheless have safety-related defects." Thus, the court allowed plaintiffs to introduce evidence to counter the *Legislature's judgment* that products complying with federal or state safety standards have a rebuttable presumption of non-defectiveness—even though the evidence was irrelevant to the head restraint here. In defending this interpretation, the court stated it had no guidance on "what evidence a plaintiff may introduce to rebut the presumption." This Court should grant review to provide that guidance.

Second, the Court of Appeals similarly misappropriated the Legislature's requirement that a plaintiff demonstrate that a reasonable alternative design existed at the time of sale in order to allow evidence of subsequent remedial measures. Under Wisconsin law, "evidence of remedial measures taken subsequent to the sale of a product is not admissible for the purpose of showing a . . . design defect in a product." Wis. Stat. § 895.047(4); *see also* Fed. R. Evid. 407—Notes of Advisory Comm. (noting the bar on subsequent remedial evidence advances the "social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety"). In explaining why evidence of a later seat design was admissible, the court stated it was *because* the legislature "made the existence of a reasonable alternative design part of the plaintiff's burden of proof." The future

design, the court said, could be used to suggest it was theoretically possible that the manufacturer could have thought of that design earlier. The only limitation the court put on allowing such subsequent measures is whether the product contained a "technological breakthrough" making the design unavailable when sold.

This rule undermines the way that safety measures progress, particularly in automobiles. Designing a part or safety measure often represents trade-offs, as making a car safer in one way could create higher risks in others. As a result, manufacturers, often in coordination with federal regulators, will be encouraged to try multiple ways of designing a part in order to see which provides the most benefit to the most people in the most situations. Choosing a different design later, does not make the earlier design more or less defective. The Court should grant review to ensure that Wisconsin evidentiary rules follow, not undercut, the Legislature's enactments and remain consistent with how automobile safety progresses.

III. THE COURT SHOULD GRANT REVIEW TO GUIDE JUDGES ON FULFILLING THEIR "GATEKEEPER" ROLE AS TO THE SCOPE OF ADMISSIBLE EXPERT EVIDENCE.

Finally, the Court should grant review to ensure that Wisconsin judges are properly instructed to be gatekeepers of the scientific testimony in their courtrooms. Here, the trial court allowed two Plaintiffs' experts to validate each other's opinions in ways they were not qualified to do: Plaintiffs' biomechanical engineer testified on medical causation, and Plaintiffs' neurosurgeon testified on biomechanical questions. The result was an unreliable and highly misleading united front. Again, the Legislature's 2011 reforms sought to prevent this situation. *See* Wis. Stat. § 907.02(1). As this Court has recognized, the Legislature amended Wisconsin's statute governing the admissibility of expert evidence to create a "heightened standard" mirroring Federal Rule of Evidence 702. *In re Commitment of Jones*, 2018 WI 44, ¶ 32, 381 Wis. 2d 284, 911 N.W.2d 97.

Inherent in this standard is that *each* opinion put forth by an expert is within that individual's expertise to make. *See Daubert v. Merrell Dow Pharms., Inc.*, 509

U.S. 579, 592 (1993) (admission of expert evidence "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience *of his discipline*"). Otherwise, judges' gatekeeping role would resemble a one-way door in which an admitted expert can opine on other issues in a case that exceed his or her qualifications, including bolstering the opinions of others.

It has been the experience of AAI, its members, and their counsel that when courts admit expert testimony that has not been properly validated, automobile manufacturers are particularly susceptible to "deep pocket jurisprudence." Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359, 395-404 (2018). In these cases, a jury awards a severely injured plaintiff a large recovery, not against the wrongdoer—here the teen who struck Mr. Vanderventer—but the automobile manufacturer because the wrongdoer does not have sufficient resources to cover the considerable costs of the plaintiff's injuries. Automobile manufacturers must not become the insurers of last resort for all severe collisions involving their vehicles.

This case provides the Court with an important opportunity to address multiple evidentiary issues and provisions stemming from the Legislature's 2011 enactments. This law was enacted to protect the integrity of civil litigation in Wisconsin from the types of errors that pervaded this case.

CONCLUSION

For these reasons, the Alliance for Automotive Innovation respectfully requests that the Court grant the Petition.

Dated this 9th day of December 2022.

Respectfully submitted,

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By: *s/Kendall W. Harrison*

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FORM AND LENGTH CERTIFICATION

I hereby certify that the foregoing conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,950 words.

Dated this 9th day of December 2022.

s/Kendall W. Harrison
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