FILED
12-13-2022
CLERK OF WISCONSIN
SUPREME COURT

No. 2020-AP-1052

STATE OF WISCONSIN
SUPREME COURT

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
Circuit Court Case No. 16-CV-1096

NON-PARTY BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REVIEW

Andrew C. Cook, SBN 1071146
ORRICK, HERRINGTON & SUTCLIFFE LLP
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005-1706
(202) 339-8597
andrew.cook@orrick.com

Counsel for the
American Tort Reform Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

The Court of Appeals decision transforms liability reforms that the Wisconsin State Legislature enacted to ensure that parties receive fair trials into a mechanism for plaintiffs to introduce irrelevant and highly prejudicial evidence. The decision also affirms the trial court's admission of novel, developed-for-litigation expert testimony that would never pass muster in the real world of automobile design, including allowing an engineer to present untested theories and a medical doctor to opine on seat back foam and headrest prongs. Because of these rulings, the jury returned a $38 million verdict. It allocated 84% of this liability to the automaker, blaming the Plaintiff's tragic injury on the car's seat back and headrest design, rather than the teenage driver who rear-ended the Plaintiff at 40 miles per hour or the Plaintiff's pre-existing severe degenerative spinal condition.

This Court should grant the Petition to correct these errors. The Court's review is needed to ensure that Wisconsin juries are not influenced by irrelevant and highly prejudicial evidence, defendants are not penalized for developing new and improved products, and courts decide complex cases based on reliable expert testimony. Proper application of the key evidentiary rules at issue here are not only important to the parties in this case, but affect the overall fairness and accuracy of Wisconsin's civil justice system.

STATEMENT OF INTEREST

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA files *amicus curiae* briefs in cases, like this one, involving important liability issues. ATRA also supports legislative reforms, including the product liability and expert testimony laws at issue in this case, to ensure that liability decisions by juries are based on sound science, not anti-corporate bias or perception that defendants have deep pockets.

For over two decades, ATRA and its members have closely monitored court decisions and litigation practices, publishing an annual "Judicial Hellholes" report that shines a spotlight on court rulings that permit novel legal theories, demonstrate uneven application of evidentiary rules, permit admission of junk science, and result in excessive damage awards, among other problematic practices. *See* Am. Tort Reform Found., Judicial Hellholes 2022/23, at 79-80. In over two decades of publishing this report, ATRA has never placed Wisconsin courts on its list of the most concerning jurisdictions or areas to watch. In addition, though ATRA files dozens of *amicus briefs* each year across the country, often in response to troubling practices or rulings, it has filed a brief in Wisconsin only once in recent memory.[1] The trial of this case and Court of Appeals ruling affirming the judgment, however, contain many of the hallmarks of problematic jurisdictions.

ATRA is concerned that the Court of Appeals decision, if not reversed, will tarnish Wisconsin's reputation as a state with a balanced civil litigation environment in which courts serve as gatekeepers against unreliable expert testimony, exclude irrelevant and highly prejudicial evidence, and properly apply legal reforms.

ARGUMENT

I. This Court Should Correct the Court of Appeals' Transformation of a Presumption that a Compliant Product is Not Defective into a Mechanism for Plaintiffs to Introduce Irrelevant and Highly Prejudicial Evidence

In 2011, as part of comprehensive tort reform legislation, the Wisconsin legislature codified a rebuttable presumption that a product is not defective if it, "at the time of sale, complied in material respects with relevant safety standards, conditions, or specifications" with federal or state approvals or regulations. 2011 Wis. Act 2, § 31 (codified at Wis. Stat. § 895.047(3)(b)). The trial court,

[1] In that case, *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678, this Court agreed with ATRA's position that a $750,000 limit on noneconomic damages in medical liability cases was constitutional, reversing the circuit court and finding *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, was wrongly decided.

however, allowed the Plaintiff to "rebut" this presumption by taking judicial notice of 85 unrelated recalls that Hyundai and Kia conducted, dating back to 1986. The Court of Appeals affirmed, effectively transforming a presumption intended to encourage full compliance with government safety standards and reward responsible conduct into a weapon for plaintiffs' lawyers to punish manufacturers for what may be routine, responsible conduct.

Wisconsin is among several states that have codified a rebuttable presumption that products that comply with government safety standards or are approved by a government agency are not defective.[2] Some states also recognize this principle as a matter of common law. *See, e.g., Beatty v. Trailmaster Prods., Inc*., 625 A.2d 1005, 1014 (Md. 1993) (recognizing conformity with a government standard may preclude a finding of negligence or product defectiveness, absent special circumstances). These laws help ensure that juries hear and appropriately consider a product's compliance with government standards when they evaluate whether its design or warnings are defective.

The Court of Appeals ruled that evidence of unrelated recalls, while not relevant to whether the seat back or headrest of the 2013 Elantra is defective, could rebut the statutory presumption because it "tended to show that vehicles that comply with [Federal Motor Vehicle Safety Standards] could nonetheless have safety-related defects." (Op. at ¶90). Section 895.047 does not specify what evidence a plaintiff may use to rebut the presumption that a product design that complies with government safety regulations is not defective. However, the concept of "rebutting" means showing that the "presumed fact"—the 2013 Hyundai Elantra seat back, which complied with government safety standards, is not defective—is untrue. *See* Wis. Stat. § 903.01.

[2] *See* Colo. Rev. Stat. § 13-21-403; Kan. Stat. Ann. § 60-3304; Mich. Comp. Laws Ann. § 600.2946(4); Tenn. Code Ann. § 29-28-104(a); Tex. Civ. Prac. & Rem. Code Ann. § 82.008; Utah Code Ann. § 78B-6-703(2).

Introducing evidence of 85 recalls of different models and components that have no similarity to allegations in the case does not serve a proper rebuttal purpose. Rather, evidence that would rebut the presumption of non-defectiveness includes, for example, that the specific seat back standard at issue was outdated or insufficient to protect public safety, or the automaker submitted flawed or fraudulent information to the National Highway Traffic Safety Administration (NHTSA) related to its compliance with that standard. The American Law Institute has recognized this approach. *See* Restatement Third of Torts: Prods. Liab. § 4 cmt. e (1998) (observing that a court may find a product that complies with a safety standard not defective as a matter of law when the safety standard (1) is current; (2) addresses the aspect of product design at issue in the litigation; (3) resulted from a full, fair, and substantial deliberative process reflecting the agency's expertise; and (4) was not tarnished by the withholding or misrepresentation of material information). Likewise, some states with statutes similar to Wisconsin have codified this approach.[3]

The Court of Appeals' observation that the trial court did not permit the Plaintiffs to delve into the details of each recall (Op. at ¶92) and instead discussed the recalls "only in the aggregate" (Op. at ¶41) does not cure the prejudice this tactic caused the Defendant. The Plaintiffs' lawyers made the unrelated recalls central to their case. They asked multiple witnesses about the recalls, including referring to the recalls when questioning a safety engineer and a Hyundai witness. (*Id*.). They even emphasized the recalls in their closing argument, telling the jury as it was to begin deliberations, of:

> 86 different recalls that Hyundai has conducted. 86 recalls that affected over 8.6 million cars. 8.4 million cars on the roadway carrying moms and dads and kids and grandmas and grandpas and aunts and uncles, 8.4 million cars that had defects, safety defects.

[3] *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 82.008 (providing that a plaintiff can overcome a rebuttable presumption by showing that the applicable standards or regulations were inadequate to protect the public from an unreasonable risk of injury or the manufacturer withheld or misrepresented information to the agency).

(Op. at ¶41).

This approach left the jury to ponder whether each of these recalls stemmed from a serious safety threat. Indeed, Plaintiffs' closing argument gave the distinct impression that, by recalling other products, Hyundai, had a pattern of producing unsafe vehicles and engaged in misconduct. Such recalls could also reflect, however, that a company carefully monitors its products and cautiously, proactively, and responsibly initiates a recall when even a minor issue arises.

The Court should grant review to clarify what evidence a Plaintiff may properly use to rebut the presumption of non-defectiveness provided under Section 895.047 and advise courts that a manufacturer's unrelated recalls are inadmissible for this purpose. Unless it does so, no rational manufacturer would invoke the presumption, nullifying the legislation.

II. This Court Should Correct the Misuse of Evidence of Subsequent Remedial Measures to Rebut a Manufacturer's General Defense or Preemptively "Impeach" Testimony a Defendant Has Not Offered

This Court should also grant the Petition to examine the trial court's admission of evidence of a manufacturer's adoption of product improvements after an injury occurred. The Court should rule that such evidence is inadmissible to show a reasonable alternative design existed *at the time of sale* of the allegedly defective product and cannot "rebut" a manufacturer's general defense of a case.

The 2011 legislative reforms require a plaintiff who alleges that a product's design is defective to establish that "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe." Wis. Act 2, § 31 (2011) (codified at Wis. Stat. § 895.047(a)). The legislation also codified the longstanding prohibition on admission of subsequent remedial measures. It provides that "evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purposes of showing . . . a defect in the design of the product," except "to show a

reasonable alternative design that existed at the time when the product was sold." *Id*. (codified at Wis. Stat. § 895.047(4)). Wisconsin law had already long recognized this principle, recognizing that post-accident conduct is "not admissible to prove negligence or culpable conduct in connection with an event," but may be offered for impeachment or other purposes. Wis. Stat. § 904.07.

These statutes encompass the strong policy of encouraging businesses to take steps to improve public safety following an incident without fear that plaintiffs' lawyers will use changes against them to suggest that they previously operated with insufficient care or made unsafe products. As the U.S. Supreme Court has long recognized, introduction of subsequent remedial measures tends to penalize those who are most careful and concerned with the lives of others, and "virtually holds out an inducement" for continued unsafe conduct. *See Columbia & Puget Sound Railroad Co. v. Hawthorne*, 144 U.S. 202, 208 (1892); *see also* Fed. R. Evid. 407, Notes of Advisory Comm. ("[The] ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.").

In this instance, the trial court allowed the Plaintiff to introduce evidence drawing the jury's attention to changes in the design of the seat back that Hyundai incorporated in 2017, years after the Plaintiff purchased the Elantra. (Op. at ¶97). The Court of Appeals found no error in admitting evidence of a subsequent change in the design of a product because, absent a "technological breakthrough," it tends to show a reasonable alternative to the design at the time of sale. (Op. at ¶99).

In addition, the Court of Appeals found that the trial court properly admitted evidence of subsequent remedial measures for impeachment purposes. The Court properly recognized that "for evidence of subsequent remedial measures to be admissible for impeachment purposes, the evidence must contradict a specific fact to which a witness testified." (Op. at ¶103 (quoting *Estate of Brown v. Physicians Ins. Co. of Wis., Inc*., No. 2010AP274, ¶ 19 (WI App Feb. 8, 2011)). The Court of Appeals, however, then pointed to generic statements about the general safety of the

design at issue to support use of a subsequent design for impeachment purposes. *See* Op. at ¶104 (referring to testimony describing the design as "state of the art" and "abundantly safe"). Subsequent remedial measures could be introduced, the Court of Appeals found, to impeach the defendant's suggestion that the "design could not be improved upon" (Op. at ¶105), a statement that no witness appears to have made during trial.

Also troubling is the Court of Appeals' finding that the trial court could allow the Plaintiffs to introduce evidence of the later adopted design to impeach the automaker's "general defense of the case," including evidence that the automaker "would later present at trial" to show the product was not defective. (Op. at ¶107). The Court of Appeals concludes this analysis by downplaying the influence of the subsequent remedial measures on the jury, even while acknowledging that the Plaintiffs' counsel referenced the later seat back design in the opening statement and closing statement, questioned an expert witness about it, and displayed a model of the subsequent design in view of the jury for nearly the entire trial. (Op. at ¶108).

The Court of Appeals' reasoning strips away the legislatively codified bar on introducing subsequent remedial measures. While there are exceptions to this prohibition, the door to such evidence only opens to contradict a witness's specific assertion that can be shown inaccurate based on a later design. Unless reversed, other courts may find subsequent remedial measures are admissible simply in response to manufacturer's evidence showing that a product is not defective and without the need for a plaintiff to point to the need to rebut any particular testimony.

III. Allowing Engineers to Offer Novel, Untested Theories and Medical Doctors to Opine on Product Design Cries Out for Judicial Gatekeeping

Wisconsin's strengthening of expert testimony standards was a centerpiece of the 2011 reforms. The lower court undercut this law by allowing expert witnesses to offer an untested, novel theory and opine on areas beyond their expertise.

Wis. Stat. § 907.02 requires Wisconsin's judges to serve as gatekeepers against unreliable expert testimony, not just admit witnesses based on their

qualifications. *See* 2011 Wis. Act 2, § 34, 37, 38; *In re Commitment of Jones*, 381 Wis. 2d 284, 2018 WI 44, ¶¶ 31-32, 911 N.W.2d 97. This duty requires courts to evaluate whether proposed expert testimony is based on "sufficient facts or data" applied through "reliable principles and methods" to the facts of the case. Wis. Stat. § 907.02(1). In determining whether proposed expert testimony is reliable, courts typically consider whether the evidence can be, and has been, tested. *See Jones*, 2018 WI 44, ¶ 33. The Court of Appeals, however, characterized major flaws in the Plaintiffs' expert testimony as "grist for the mill on cross-examination," (Op. at ¶68), taking a send-it-all-to-the-jury approach.

First, the Court of Appeals affirmed the trial court's decision to allow an engineer, Dr. Saczalski, to espouse a novel, developed-for-litigation theory asserting that an automobile's seat back design caused a driver's paralysis. According to the Court, the expert's "professional experience, education, training, and observations" was sufficient to admit his untested theory (Op. at ¶63). Testing a theory, the Court of Appeals found, is optional (Op. at ¶¶64-68), even in the context of automobile design where, outside the courtroom, rigorous and repeated testing is the norm. *See* Brief of *Amicus Curiae* Alliance for Automotive Innovation (examining mandatory federal testing requirements for automobile design).

The Court of Appeals then affirmed the trial court's decision allowing the Plaintiffs' treating neurosurgeon, Dr. Kurpad, to echo that speculative testimony. (Op. at ¶¶23, 28). It even allowed the medical doctor to opine on product design and causation, including the design of headrest prongs and the level of foam padding inside an automobile's seat back. (Op. at ¶¶33, 73). This admitted expert testimony strayed far from exploring the treatment provided to the Plaintiff, the Plaintiff's medical condition, or even the general causes of spinal fractures. The Court of Appeals wrote off substantial gaps in this expert's testimony as "going to the weight, not the admissibility" of opinions (Op. at ¶74, "Hyundai was free to highlight information Kurpad overlooked or declined to obtain, calculations he did not make, and tests he did not run to diminish the persuasiveness of his opinion.").

As this Court recognized in *Jones*, Wis. Stat. § 907.02 "require[s] more of the gatekeeper"—it demands a threshold determination that proposed expert testimony is reliable before sharing it with the jury. 2018 WI 44, ¶ 32. An example of abrogating the gatekeeping function is ignoring a relevant reliability factor, such as by admitting an expert's theory that is readily testable even though the expert did not attempt to prove its accuracy, especially in product liability cases where testing is crucial. *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, 241-48 (2006) ("[W]ithout testing, the expert has thrown his or her hands in the air and exclaimed, 'Gotcha!' after developing a reasonable theory to explain an event, but before verifying it.").

Allowing unsound expert testimony can result in the removal of beneficial products from the market, raises the costs of goods for consumers, and undermines the truth-finding function of the courts. *See id.* at 224-26. This Court should grant review to ensure that trial courts are properly fulfilling their gatekeeping role and that the statute is keeping the courtroom door "closed to junk science" as intended. *Jones*, 2018 WI 44 at ¶ 33.

CONCLUSION

For these reasons, the American Tort Reform Association respectfully requests that the Court grant the Petition.

Dated: December 8, 2022.

Respectfully submitted,

Andrew C. Cook, SBN 1071146
ORRICK, HERRINGTON & SUTCLIFFE LLP
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005-1706
(202) 339-8597
andrew.cook@orrick.com

Counsel for the American Tort Reform Association

CERTIFICATION BY ATTORNEY

I hereby certify that this Nonparty Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a Nonparty Brief produced with a proportional serif font. The length of this brief is 2,989 words.

Dated: December 8, 2022

Andrew C. Cook

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on December 8, 2022, I caused this brief to be sent by a third-party commercial carrier for delivery to the Clerk of the Supreme Court. I further certify that this brief was correctly addressed.

Dated: December 8, 2022

Andrew C. Cook

CERTIFICATE OF COMPLIANCE WITH § 809.19(12)

I hereby certify that:

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

I further certify that:

This electronic petition 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 opposing parties.

Dated: December 8, 2022

Andrew C. Cook

CERTIFICATE OF SERVICE

I certify that on December 8, 2022, I caused true and correct paper copies of the foregoing brief to be delivered to counsel of record and parties. Addressed as follows:

Ryan Walsh
Eimer Stahl LLP
10 East Doty Street, Suite 621
Madison, WI 53703

Matthew H. Lembke
Bradley Arant Boult Cummings LLP
1819 Fifth Ave. North
Birmingham, AL 35203

Patrick S. Nolan
Matthew Splitek
Stacy A. Alexejun
Evan Thomsen
Quarles & Brady LLP
411 East Wisconsin Ave., Suite 2400
Milwaukee, WI 53202

Timothy S. Trecek
Jesse B. Blocher
Susan R. Tyndall
Habush, Habush & Rottier
S.C. N14W23755 Stone Ridge Dr.
#100
Waukesha, WI 53188

Christine M. Rice
Simpson & Deardorff
S.C. 311 E. Chicago St., Ste. 410
Milwaukee, WI 53202

Dated: December 8, 2022

Andrew C. Cook