

FILED
12-16-2022
CLERK OF WISCONSIN
SUPREME COURT

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

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

Ryan J. Walsh
Counsel of Record
EIMER STAHL LLP
10 East Doty Street
Suite 621
Madison, WI 53703
Telephone: (608) 620-8346
Fax: (312) 692-1718
rwalsh@eimerstahl.com

Matthew H. Lembke (*pro hac vice*)
BRADLEY ARANT BOULT
CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203
Telephone: (205) 521-8000
mlembke@bradley.com

Patrick S. Nolan
Matthew Splitek
Stacy A. Alexejun
Evan Thomsen
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Suite 2400
Milwaukee, WI 53202
Telephone: (414) 277-5465
patrick.nolan@quarles.com

*Attorneys for Petitioners Hyundai Motor America and
Hyundai Motor Company*

TABLE OF CONTENTS

ARGUMENT	3
CONCLUSION.....	5

ARGUMENT

Hyundai submits this brief solely to address several misstatements in Plaintiffs Edward and Susan Vanderventer's opposition to the petition for review.

First, the Vanderventers state that Hyundai made a “false assertion that this [C]ourt has provided precedential guidance with respect to *Daubert* on only one occasion,” claiming that this “ignores multiple cases.” Resp. 8–9. But they cite no published authority showing that Hyundai's assertion was “false.” That is because none exists. The single authoritative decision of this Court addressing the *Daubert* reliability standard in Section 907.02(1) is *In re Commitment of Jones*, 2018 WI 44, 381 Wis. 2d 284, 911 N.W.2d 97. This Court's decision in *Seifert v. Balink*, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816, also discussed *Daubert*, but no opinion in that case commanded a majority, so none is precedential. This Court's other decisions addressing the new Section 907.02(1) did not apply the *Daubert* reliability standard. *See State v. Dobbs*, 2020 WI 64, 392 Wis. 2d 505, 945 N.W.2d 609; *In re Commitment of Alger*, 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346.

Second, the Vanderventers incorrectly claim that the court of appeals did not hold that evidence unrelated to the presumed fact could be admitted to rebut the presumption of nondefectiveness in Section 895.047(3)(b). Resp. 7–8, 23. According to the Vanderventers, the court merely held that recall evidence—including, as here, evidence of 85 recalls of multiple different products over 30 years, *see* R.1174; R.1175—could be admitted to

rebut Hyundai's claims about the efficacy of federal motor vehicle standards. Resp. at 7–8. But that is found nowhere in the court's decision. To the contrary, the court could not have been clearer that the recall evidence could come in because, in its view, evidence admissible to rebut the presumption in Section 895.047(3)(b) is *not* "limited by the 'presumed fact' under Wis. Stat. § 903.01." Pet. App. 46.

Third, the Vanderventers claim that Hyundai "concedes" or otherwise "waived" arguments relating to the AD seat design and impeachment. Resp. 8, 28–29. But Plaintiffs' argument that evidence of subsequent remedial measures could have been used for impeachment here is an argument for harmlessness, which Hyundai clearly did not concede. *See* Pet. 24 n.4. And because the court of appeals was the first to rely on the theory of anticipatory impeachment, *see* Pet. App. 53–54, Hyundai plainly could not have "waived" a challenge to this theory by failing to raise it earlier. Resp. 29.

Fourth, the Vanderventers' repeated claims that Hyundai's Petition "misrepresents the . . . law" are just thinly veiled objections to Hyundai's parsing of the statutes—illustrating precisely why this Court's review is warranted. For example, Plaintiffs say that Hyundai's legal arguments regarding the interpretation of Sections 895.047(3)(b) and 903.01 are incorrect. Resp. 21–22, 24. But they simply argue for a different interpretation of the statutes, claiming that the Legislature "did not circumscribe the evidence permitted to rebut" the

presumption. Resp. 22. This Court can, and should, settle who is right.

Fifth, the Vanderventers make several misleading statements about the facts. For example, they repeatedly imply that Dr. Saczalski tested his theory of injury. Resp. 18, 36. But Saczalski never tested whether the crash here would (or even could) have generated enough force via the headrest prongs to injure Mr. Vanderventer's spine. Vanderventers' counsel instead performed testing for Saczalski on a different seat design than the one at issue here, *see* Pet. 13, and Saczalski referred to a test conducted by Hyundai examining different circumstances than those here—namely, when pressure is slowly and mechanically applied to and released from the headrest. *See* Reply Br., *Vanderventer v. Hyundai*, No. 2020AP1052 (Ct. App. Jan. 7, 2022), at 3–5. Plaintiffs also represent that Hyundai did not object to the AD seat design evidence until “[m]id-trial,” but Hyundai raised its objections before the second day of a two-week trial. *See* R.1787:3–4.

CONCLUSION

This Court should grant the petition for review.

Dated this 16th day of December, 2022.

Respectfully submitted,

Electronically signed by Ryan J. Walsh

Ryan J. Walsh

(State Bar No. 1091821)

EIMER STAHL LLP

10 East Doty Street

Suite 621

Madison, WI 53703

Telephone: (608) 620-8346

Fax: (312) 692-1718

rwalsh@eimerstahl.com

Patrick S. Nolan

(State Bar No. 1024491)

Matthew Splitek

(State Bar No. 1045592)

Stacy A. Alexejun

(State Bar No. 1074016)

Evan Thomsen

(State Bar. No. 1114697)

QUARLES & BRADY LLP

411 East Wisconsin Ave., Suite 2400

Milwaukee, WI 53202

Telephone: (414) 277-5465

patrick.nolan@quarles.com

Matthew H. Lembke (pro hac vice)

BRADLEY ARANT BOULT

CUMMINGS LLP

1819 Fifth Avenue North

Birmingham, AL 35203

Telephone: (205) 521-8000

mlembke@bradley.com

*Attorneys for Petitioners Hyundai
Motor America and Hyundai Motor
Company*

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 663 words.

Dated this 16th day of December, 2022.

Respectfully submitted,

Electronically signed by Ryan J. Walsh
Ryan J. Walsh