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

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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,

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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
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