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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2020AP001052

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.

PLAINTIFFS-RESPONDENTS' BRIEF IN RESPONSE TO BRIEFS OF AMICUS PARTIES, WASHINGTON LEGAL FOUNDATION ("WLF"), AMERICAN TORT REFORM ASSOCIATION ("ATRA") ALLIANCE FOR AUTOMOTIVE INNOVATION ("AAI"), PRODUCT LIABILITY ADVISORY COUNCIL ("PLAC"), FCA, CHAMBER OF COMMERCE ET AL ("CHAMBER"), AND THE WISCONSIN LEGISLATURE

APPEAL FROM THE CIRCUIT COURT OF RACINE COUNTY, CASE NO. 2016CV001096
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ARGUMENT

The amicus briefs from various groups that Hyundai is a member of or aligned with, WLF, ATRA, AAI, PLAC, FCA, and the Chamber, add nothing of substance to the issue of whether the Court should grant review. These submissions are little more than hyperbolic position statements supporting Hyundai, which are of little value to assessing this lengthy record to determine if any significant issue exists meriting review: **"**Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed." *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004).

As explained by Judge Neal Nettesheim and Clare Ryan, *Friend of the Court Briefs: What the Curiae Wants in an Amicus*, Wisconsin Lawyer (March 31, 2008),[1] amicus briefs are "a valuable aid to a court presented with issues that are novel, technical, or complex or that will have far-reaching effect." This case has no such issues. Rather, as discussed in Vanderventer's response to Hyundai's petition for review, it involves only mine-run evidentiary issues.

These amicus parties apparently have a joint strategy to over dramatize and transform run-of-the-mill evidentiary decisions into political theater. The claimed evidentiary errors have been thoroughly vetted and no significant legal precedent arises from this case. The unanimous court of appeals panel, including a judge specially appointed by this Court,[2] confirmed as much: "After careful review of the record and the parties' arguments, we see no basis to disturb the jury's verdict. The issues raised by Hyundai concern evidentiary matters that were committed to the trial court's discretion." *Vanderventer v. Hyundai Motor America*, 2022 WI App 56, ¶3.

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[1] *Available at* https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=1255 (last visited December 8, 2022).

[2] (5/9/22 Substitution Order.)

Moreover, each of these submissions leans heavily into grossly exaggerated rhetoric about the substance and impact of the rulings at issue, seizing and further expanding upon Hyundai's numerous overstatements, embellishments, and plain false statements about what was decided below. A cynic might view these submissions as a coordinated effort to amplify a false narrative. Whether they are meant to intentionally bolster fictitious claims about the lower courts' holdings or these special interest groups have been led astray by Hyundai's misstatements, there is no question that they do not accurately recite the issues in this case or the record supporting the lower courts' decisions. When the record and the court of appeals' decision is considered comprehensively and objectively, there is no legitimate concern over erroneous application of law that would impact future cases.

These submissions do not demonstrate a need for further review, because: (1) these groups raise issues that Hyundai did not appeal, (2) handwringing over discretionary decisions based on a unique record is unwarranted, and (3) the Legislature's proposed submission supports the court of appeals' decision and shows why further review is unnecessary.

I. These submissions do not justify granting review because the amicus parties raise issues that Hyundai did not appeal.

It seems axiomatic that amicus submissions raising issues that were not appealed are not helpful to the Court in considering whether to accept the petition, because those issues will not be heard even if review is granted. Some examples are as follows:

A. Hyundai did not appeal any damages issues.

Some submissions raise concern over the size of the verdict. That concern is misplaced because Hyundai has not appealed any damages issues and has therefore conceded the damages are commensurate with Vanderventer's horrific injuries. *White v. City of Watertown*, 2019 WI 9, n.5, 385 Wis.2d 320, 325, 922

N.W.2d 61 (internal citations omitted) ("[A]n issue… not raised on appeal, is deemed abandoned").

Regardless, the record alleviates any such concern because the injuries were catastrophic (Resp. to Petition, p.11) and the largest component of the damages awarded were for past and future medical and care expenses – which is why Hyundai found no grounds to appeal. (R1485.)

Purported concern over juror sympathy, large verdicts, and "deep pockets justice" is unfounded. Unlike some states, there is no concern in Wisconsin that juries will treat "deep pockets" defendants as insurers because juries are not told the effect of the verdict and are instructed to answer questions based on the evidence regardless of their answers to other questions. *McGowan v. Story*, 70 Wis.2d 189, 196, 234 N.W.2d 325 (1975); (R1777:20.) Wisconsin courts "assume that a jury follows the instructions given by the trial court." *Ford Motor Co. v. Lyons*, 137 Wis.2d 397, 457, 405 N.W.2d 354 (Ct.App.1987). Here, the jury was properly instructed to disregard sympathy, evaluate witness credibility, and hold Vanderventer to the burden of proof. (R1777:6-8,13-18,20-23,32.) No damages issue exists here.

B. Hyundai did not object to, much less appeal, admission of Sazcalski's demonstrative exhibit showing the maximum deformation of the injurious posts.

AAI criticizes admission of a demonstrative exemplar seat created by Saczalski that showed the maximum deformation of the guides. (R875.) However, ***Hyundai had "no objection" to the admission of that exhibit at trial or and never appealed any issue related to its admission***. (R1763:18,124,148; Hyundai Ct. App. Brief; Petition for Review.) Any issue relating to this demonstrative exhibit was waived and not subject to potential review here. *State v. Cameron*, 2016 WI App 54, ¶12, 370 Wis.2d 661, 885 N.W.2d 611 (party must object at trial to preserve appellate issue); *Adams Outdoor Advert. v. City of Madison*, 2018 WI 70, n.8, 382 Wis.2d 377, 914 N.W.2d 660 (courts decline to address new issues

"raised for the first time in an amicus brief, as…not properly before us.…") (internal citations omitted.)

C. Hyundai's "DISH theory," rejected by the jury, is not at issue here.

WLF regurgitates disputed claims from Hyundai's experts that Vanderventer's paralysis was caused by a degenerative condition, "DISH," which was rejected by the jury. (Proposed brief, p. 3.) Nothing related to the "DISH theory" has been appealed. (*See* Hyundai PFR.) WLF presents disputed, failed defense theories as established fact ignoring established precedent that the evidence must be viewed in light most favorable to the verdict. *Zartner v. Scopp,* 28 Wis.2d 205, 209, 137 N.W.2d 107 (1965).

The DISH theory has nothing to do with the *Daubert* challenges at issue and was contrary to the physical evidence. WLF omits that in testimony ***not subject to any Daubert challenge***, Dr. Kurpad concluded that "DISH was [a] comorbidity, not causal," and a DISH fracture was "impossible" (R1787:72,81.) Kurpad explained in great detail how the pattern of the fracture, Vanderventer's lack of pre-existing symptoms, his flexibility, his bone strength, and surgical findings showed definitively that Vanderventer's paralyzing injury was not a DISH fracture. (R1773:146;R1787:44-46,60-61,102-03,109-12; R1774:39,43-46;R1770:160.) WLF further ignores that a rear passenger, who also had a degenerative back condition, who Hyundai's experts admitted was in the most vulnerable position in the vehicle, was uninjured because the posts in her seat did not deform toward her spine. (R1761:143-44,149-150;R1762:47.) The debunked "DISH theory" is not at issue here.

D. Hyundai did not appeal any issue of expert "infallibility."

Without discussing any particular error, the Chamber implicitly argues that because Vanderventer prevailed, there must have been an error in admission of Vanderventer's expert proof. (Chamber Brief, p. 10.) This outcome-driven analysis apparently advocates that legitimate personal injury claims like this one should be an exercise in futility for tort victims, and a just plaintiffs' verdict is

conclusive proof of error. Perhaps understandably, the Chamber wishes to support its member businesses like Hyundai, but its perspective cannot square with Wisconsin law, which allows seriously injured tort victims, like Vanderventer, to make such claims.

The record in this case eviscerates the Chamber's arguments that experts are "accompanied by 'an aura of scientific infallibility'" and jurors "accept [expert testimony] without critical scrutiny." (Chamber Brief, p. 10). These claims are based on the obviously flawed premise that studies of large verdicts show that plaintiffs in such cases presented expert testimony. (*Id*.) Of course that is true, because in complex cases (and almost all personal injury cases), the plaintiff is ***required*** to present expert testimony to meet the burden of proof.

This non-sensical "infallibility" argument ignores the record in this case where ***Hyundai itself called five well-credentialed experts*** to counter Saczalski and Kurpad. Hyundai also cross-examined both Kurpad and Saczalski, literally for days. Definitively demonstrating that the Chamber's proposition is not true in this case, during deliberations, the jury asked to view the physical evidence from the crash: the subject seat with the deformed hollow tube and posts pointing toward Vanderventer's back, and that seat foam containing permanent witness marks where it had been crushed between the injurious posts and Vanderventer's back. (R1777:37-43.) This request demonstrates that the jury did not just accept the experts' testimony but instead viewed the physical evidence itself. That the jury found Vanderventer's proof, which included undisputed physical evidence of the defect and its forceful impact with Vanderventer's back at the level of his paralyzing injury, more credible is not a basis for review. (R1763:134-137,145; R.1772:8.)

E. AAI's argument that Vanderventer's proof was insufficient to meet its burden was not appealed by Hyundai.

To the extent AAI is arguing that the Court can use this case to clarify the quantum of proof necessary to succeed in a products liability case, that issue was

not appealed by Hyundai. Hyundai only took issue with four claimed evidentiary errors that have been thoroughly discussed in the prior submissions. This case presents no opportunity for evaluating the type or quantum of proof necessary for plaintiffs to meet their burden.

F. PLAC's confusion over what Wis. Stat. §§895.047(4) and 904.07 govern was not appealed by Hyundai.

PLAC is apparently confused in claiming that §§895.047(4) and 904.07 conflict, and that the Court should not have allowed evidence of impeachment under §904.07 as a result. Plaintiffs have a right to bring both strict products liability and negligence claims (as Vanderventer did) under Wisconsin law. The products liability statute left negligence claims undisturbed: "INAPPLICABILITY. This section does not apply to actions based on a claim of negligence or breach of warranty." §895.047(1)(a). Section 895.047(4) deals with admission of "subsequent remedial measures" evidence pertinent to strict products liability claims, while §904.07 relates to admission in negligence actions. There is no conceivable conflict or overlap between the two.

Regardless, Hyundai has not argued at any stage of this proceeding that there is a conflict between these statutes as PLAC does. To the contrary, Hyundai now concedes that evidence of the AD was properly admitted under §904.07's impeachment exception but instead challenges the order of proof. (Resp. to Petition, p.29-32.)

II. The proposed amicus submissions ignore the record in favor of misleading platitudes.

These amicus parties seize and expand on Hyundai's misstatements of the record. Embellishment is not helpful to this Court's analysis of whether this case is appropriate for review. Careful review of the court of appeals' decision and the record reveals no legitimate cause for apprehension that the law will be misapplied in future cases. Several examples follow:

A. Hyundai admitted that its vehicle should have protected Mr. Vanderventer in this moderate severity crash.

AAI's portrayal of the crash as "horrific," an apparent attempt to absolve Hyundai of blame for Vanderventer's injuries, ignores Hyundai's admission that this was only a moderate severity crash. In fact, ***Hyundai admitted that its vehicle design should have protected occupants from serious injury in this moderate crash***. (R1769:51-52; R.1787:213-214; 1763:150.) It did not.

In rear-end accidents, the rear passengers closer to the impact are most susceptible to injuries. (R1787:77). The rear portion of the Elantra absorbed energy as designed, preventing intrusion into the occupant space. (R1763:43-44; R.1787:185-86,192-94.) Hyundai's admissions, coupled with the fact only Vanderventer was paralyzed while the other three passengers walked away with minor injuries (R1761:143-44,149-150; R1787:188-194), demonstrates the falsity of AAI's assertions.

B. The *Daubert* standard is well-established and was applied by the lower courts.

The 2011 adoption of the *Daubert*[3] standard and its application is now well-established in Wisconsin jurisprudence. Wis. Stat. §907.02; *In re Commitment of Jones,* 2018 WI 44, ¶¶7-8, 381 Wis.2d 284, 911 N.W.2d 97. Since its adoption, numerous Wisconsin cases have addressed application of §907.02, including *Commitment of Jones*. In fact, a Westlaw search for "Daubert v. Merrell" returns 187 hits, 10 in the past year alone. The standard is sufficiently well-settled in Wisconsin that most of the 2021 and 2022 appellate court cases were not worthy of publication. In short, application of §907.02 is no longer a novel issue in Wisconsin.

Arguing that the lower courts "continue to ignore" and "openly side-stepped" *Daubert*, willfully disregards their decisions and is disrespectful. *Vanderventer*, 2022 WI App 56, ¶¶31, 33, 35, 54-56. The circuit court judge

[3] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 570 (1993).

presiding over this case, the Hon. Eugene A. Gasiorkiewicz, is particularly well-versed in *Daubert* issues. As he mentioned during the trial, he has lectured throughout Wisconsin in training judges regarding *Daubert*. (R1767:7; P.App.0143.) He was also the author of an article on the evolution of the *Daubert* standard, published in the 2018 Summer edition of the American Bar Association's Judicial Division newsletter, "*Should We Continue to Allow Opinion Testimony to a 'Reasonable Scientific Certainty?*'" He also gave a presentation to the Racine County Bar Association on February 19, 2020, on *Daubert in Wisconsin: Scientific Evidence or Junk Science*.[4] Judge Gasiorkiewicz's extensive knowledge of *Daubert* enabled him to properly apply §907.02 when considering the expert testimony in this case.

The appellate court's decision correctly explained the history of the *Daubert* amendment to §907.02 and accurately set forth the well-established law regarding admissibility under that standard. *Vanderventer*, 2022 WI App 56, ¶¶54-56. Thus, there is no *Daubert* issue meriting further review.

C. Vanderventer's experts gave testimony within their respective disciplines.

These groups latch on to Hyundai's false argument that Kurpad and Saczalski were permitted to provide causation opinions in each other's disciplines. These arguments were born out of a strategic effort by Hyundai to mis-characterize each's opinions so that Vanderventer would be left without any causation testimony to meet the burden of proof. That disingenuous effort was rejected by both lower courts. *Vanderventer*, 2022 WI App 56, ¶¶71-79.

The court of appeals did not hold that medical doctors can give biomechanical opinions or biomechanical experts can give medical opinions. While demonstrating their understanding of the proper scope of a physician's causation testimony under §907.02, both lower courts confirmed Kurpad relied on

[4] Available at http://www.racinelawyers.com/news-and-postings/february-lunch-and-a-cle-daubert-presentation (last visited December 27, 2021).

Saczalski to provide the biomechanical information: "He gets information on the biomechanics from somebody else, takes that into consideration, and makes a causation connection." (R1757:23-32,159-160;R1787:58-60,R1778:86-91); *Vanderventer*, 2022 WI App 56, ¶¶70-74. Kurpad stated at least ***six times*** that he gave his causation opinion as a "treating surgeon" based on "evidence derived from the surgical procedure, direct observations, the anatomy of the fracture and the imaging." (R1757:159-160; R1787:30,65,86,92-93,110,126.) *Vanderventer*, 2022 WI App 56, ¶71.

Likewise, the circuit court agreed that Saczalski was not giving medical opinions, but rather biomechanical opinions just as the *Reference Manual on Scientific Evidence* (Federal Judicial Center, 3d ed. 2011) permits. (R1757:92-93,135-136; R1778:103-110.) Alleviating any potential confusion, the court of appeals stated: "Saczalski was not asked to diagnose the injuries Edward sustained in the accident, but instead to describe the forces exerted by and on his body during the accident and explain, 'from a biomechanical standpoint, how those forces could produce the fulcrum impact to his spine." *Vanderventer*, 2022 WI App 56, ¶79.

Review of the nuances of the basis for these expert opinions was an error-correcting function for the intermediate court and presents no opportunity to develop the law in any significant way. To the extent that these special interest groups are legitimately concerned over allowing experts to testify outside of their expertise, such trepidation finds no basis in the court of appeals' decision, leaving no cause for further review. *Id*. ¶¶71,79.

D. This case did not involve untested, novel theories.

The repeated, false claim that Saczalski was permitted to opine about novel, "untested" theories is willfully ignorant of the record. There was nothing novel about Saczalski's opinion that the defective, weak hollow tube upper seat structure deformed in the crash and angled the head restraint posts toward Vanderventer's back. Hyundai's own engineers identified this exact defect in an engineering

design drawing and then turned a blind eye toward the defect when they observed it occurring during internal testing. (R847; R852; R855; R1763:140,142; R1763:22,140-147,159-63; R1769:16.) Hyundai's biomechanical expert agreed the changed angle of the posts was "basic physics" and just a "lever." (R1773:208.) The circuit court observed that the science was "quite simple" and mostly agreed upon. (R1778:77-78.)

The physical evidence undisputedly confirmed the injury-causing defect. A joint investigation and "de-trimming" of the subject seat with Hyundai revealed the permanent upper seat frame deformation and the posts changed angle, now permanently ***angled towards Vanderventer's back, rather than away from it***. (R1763:134-36,144-145,151.) The underside of Vanderventer's seat foam was permanently damaged, leaving marks and gouges where the foam had been crushed between the posts and Vanderventer's back – indisputable physical evidence that the posts created an injurious fulcrum in Vanderventer's back. (R1763:134-37.) Hyundai's expert did not dispute that the posts caused permanent gouges in the foam during the crash. (R1772:8), or that the posts permanently deformed 20 degrees forward. (R1771:174; R1773:215-217.) Hyundai agreed (apparently without thoroughly examining the physical evidence) that such crush marks in the foam would be damning evidence of causation. (R1761:100). The court of appeals did not accept Hyundai's argument that Saczalski's opinion was "novel." *Vanderventer*, 2022 WI App 56, ¶64, n.17. The court of appeals provided neither a blanket endorsement nor rejection of "novel" opinions going forward, but rather confirmed in great factual detail how Saczalski's methodology was reliable in this particular case. *Vanderventer*, 2022 WI App 56, ¶¶57-64.

There is no legitimate concern that the lower courts permitted "junk science." Both lower courts rejected WLF's false argument that Saczalski "cobbled together" an *ipse dixit*, untested "novel theory" because he "was being paid." (WLF brief, p.15.) Setting aside that all experts are paid, WLF's protestations simply ignore the extensive analysis both lower courts did in

rejecting arguments that Saczalski's theory was novel, was *ipse dixit*, or junk science. (R1765:147-150; R1778:103-110.) *Vanderventer*, 2022 WI App 56, ¶64, n.17.

These amicus parties go on to repeat the false claim that Saczalski's opinions were not based on any testing. As a preliminary matter, no court anywhere in the country has ever stated that testing is a mandatory legal prerequisite to providing an expert opinion. "*Daubert* is a flexible test and no single factor, even testing, is dispositive." *Dhillon v. Crown Control*, 269 F.3d 865, 870 (7th Cir.2001); *Seifert v. Balink*, 2017 WI 2, ¶64, 372 Wis.2d 525, 888 N.W.2d 816. Testing is a discretionary criterion for consideration, not an "absolute prerequisite to the admission of expert testimony," even in products liability cases. *Cummins v. Lyle Indus.*, 93 F.3d 362, 369 (7th Cir.1996); *Clay v. Ford Motor Co.*, 215 F.3d 663, 668–69 (6th Cir.2000) (expert's "failure to test his theories went to the weight of his testimony…not to its admissibility….[Manufacturer] was able to challenge the testimony…on cross-examination.")

In many instances, testing is not prudent, necessary, or financially/practically feasible. "Physical testing" is not required when the expert can reliably support his opinion with mathematical models and principles. *Lapsley v. Xtek, Inc.*, 689 F3d 802, 815-16 (7th Cir.2012). Moreover, recreating industrial accidents is often impossible and unnecessary. *Id*. (re-creations of accidents "not always feasible or prudent."); *Jacobs v. Tricam Indus.*, 816 F.Supp.2d 487, 493 (E.D.Mich.2011) ("[T]esting is not required… particularly where… the expert conducted an examination of the physical evidence.")

Regardless, Saczalski relied on a bevy of testing – particularly Hyundai's own testing of the subject seat.[5] One test that Saczalski relied on showed ***this exact defect occurring,*** with the posts deforming toward the occupant when the

[5] Reliance on testing by others has long been held a reliable methodology. *Astra Aktiebolag v. Andrx Pharmaceuticals*, 222 F.Supp.2d 423, 492 (S.D.N.Y.2002) (no requirement that an expert run his own tests); *Dura Automotive Sys. Of Ind., v. CTS Corp.*, 285 F.3d 609, 612 (7th Cir.2002).

head restraint was loaded. (R1763:140-147; R855.) A Hyundai employee admitted that another internal test showed the hollow tube was the "weak link" in the seat system, always failing first under force. (R1763:22,159-63; R.852; R.1769:16.) Also, during dynamic sled testing, Hyundai's safety director observed the head restraint deforming more than the rest of the seat, just as it did during this crash. (R1053:48.) Saczalski also performed mathematical testing of the defect: finite element analysis and torsional rigidity study. (R844-46; R1787:226,262-63; R1493:70,94.) Moreover, Saczalski "facilitated and performed extensive additional testing and performed additional work—including the Quebec sled testing, competitor seat comparisons, and seat headrest analyses…" (R179:4,5,8.) Saczalski did not need to duplicate what Hyundai's testing, the mathematical analysis, and the physical evidence proved.[6] These case-specific nuances, vetted thoroughly by the lower courts, provide no basis for further review. The court of appeals decision, premised in the particular facts of this case, provides no new legal precedent that would impair manufacturers' future *Daubert* challenges.

E. Amicus parties' discussion of recalls ignores the record and the evidence Hyundai introduced.

Admission of very limited recall information must be viewed in context of the record. Here, Hyundai claimed §895.047(3)(b)'s rebuttable presumption applied because its Elantra vehicle passed FMVSS standards. Hyundai premised its defense on "the entire all (sic) the Federal Motor Vehicle Safety Standards. Those are rules, and they were followed, and they were met or Hyundai could not sell the 2013 Elantra in the United States." (R1776:150). Hyundai hired an FMVSS expert to testify that FMVSS are scientific, stringent, and "quite difficult to and challenging to meet because they are crafted to meet the need for motor

[6] AAI argues Saczalski needed to conduct unnecessary crash tests with a dummy to observe the defect causing the injury. Such a test would not have showed the injury because dummies have a steel spine. (R1765:88-89.) Obviously, an expert cannot ethically test a human under similar conditions to observe the spine fracturing.

vehicle safety..." (R1769:122-124.) He denied that FMVSS were minimum standards. (*Id*.) Hyundai argued compliance with FMVSS ***proved*** its vehicle was not defective. (R1776:150-151; R1769:124.)

Vanderventer did what the law allows – impeached/rebutted Hyundai's expert evidence and the statutory presumption. Vanderventer's rebuttal evidence directly addressed the "presumed fact:" that the vehicle was not defective ***because it complied with FMVSS standards***. The breadth of the evidence precisely corresponded with the breadth of the claims Hyundai made about its compliance with FMVSS.

The authority cited by Hyundai recognizes that not all standards have the same gravitas. For example, it discusses how claimants may introduce rebuttal evidence that such standards are "outdated," "do not meet an appropriate level of safety," and that "a reasonably prudent product seller could and would have taken additional precautions." *Miller v. Lee Apparel Co.*, 881 P.2d 576, 584–85 (Kan.App.1994). Vanderventer did precisely that - introduced evidence to show that FMVSS standards did not render this vehicle safe and that Hyundai's claims about the stringent nature and comprehensiveness of the standards were grossly exaggerated.

The limited evidence of recalls was only one component of the evidence rebutting the presumption. For example, Vanderventer obtained admissions from Hyundai's experts that FMVSS 207's regulation of seat strength has hardly been modified in 53 years, and ***testing shows a cardboard box or lawn chair can pass it***. (R1770:23; R1771:197-98.) ***Hyundai's*** expert admitted "[t]hat's why all the industry far exceeds the standard."[7] (R1771:197-98.)

[7] *Miller v. Lee Apparel Co.*, 881 P.2d 576, 586 (Kan. Ct. App. 1994) explained that, "[t]o overcome the presumption of non-defectiveness, a plaintiff must present evidence that "a reasonably prudent product seller could and would have taken additional precautions." Hyundai's expert's admission that "all industry far exceeds the standard" itself rebuts the presumption.

Hyundai's FMVSS expert agreed at trial that complying vehicles can nonetheless be defective:

> Q. You would agree, Mr. Lang, that a car can pass all minimum FMVSS standards and still be found to be defective, right?
> A. Cars that have satisfied every motor vehicle safety standards have been found to be defective, that's true.

(R1770:97.) Vanderventer also showed that FMVSS were not rigorous but instead were "minimum standards." (R1776:193.) Finally, Vanderventer introduced limited evidence of recalls to show, as Hyundai's expert admitted, that vehicles passing FMVSS standards can still have safety related defects. As to this limited recall evidence, the lower courts confirmed it "tended to show that vehicles which comply [with federal safety standards] could nonetheless have safety-related defects" and that, "in turn, could support an inference that the 2013 Elantra's satisfaction of those standards was not especially strong evidence that its driver's seat was not defective." *Vanderventer*, 2022 WI App 56, ¶90.

The relevance and potential for unfair prejudice of use of recall evidence for this limited purpose was carefully considered by both lower courts. *Vanderventer*, 2022 WI App 56, ¶¶90-92. This rebuttal evidence was introduced, in response to Hyundai's contentions that FMVSS were stringent and ensured that a vehicle was safe, to show that the FMVSS standards were outdated, do not meet an appropriate level of safety, and a reasonable manufacturer would take additional precautions. There was no dispute Vanderventer was entitled to pursue that line of impeachment/rebuttal, nor was there any objection to the vast majority of evidence used by Vanderventer to do so. The dispute revolved only around whether the recalls could be used to do it. At trial, Hyundai agreed that this was a basic relevancy and prejudice question under §§904.01 and 904.03. (R1757:147-148;R1778:125.) The recall evidence certainly had "any tendency" to support the permissible rebuttal argument. §904.01.

The court of appeals' decision, which does not broadly sanction admission of recall evidence, is limited to this unique record and provides no significant

opportunity for law development: "[T]he court made clear that the evidence was only relevant to rebutting Hyundai's reliance on compliance with the FMVSS, and our review of the trial transcript indicates that the parties hewed closely to that limitation." *Id*. The impact of this limited recall evidence was so insignificant that Hyundai did not even request a limiting instruction. *Vanderventer*, 2022 WI App 56, ¶92.

The amicus parties' incorrectly portray FMVSS as an ***un-rebuttable*** bar to liability contrary to §895.047(3)(b) and the FMVSS themselves. These are "minimum standard[s]." 49 U.S.C. §30102(a)(10). Compliance was not intended by Congress to supplant civil liability. 49 U.S.C. §30103(e). Even Hyundai conceded "[t]he Hyundai Defendants are not arguing that their compliance with the FMVSS exempts them from liability…" (R423:4.)

Congress specifically established that despite compliance with FMVSS, motor vehicles can still have "defects" related to "motor vehicle safety" that present an "unreasonable risk of death or injury in an accident," requiring the manufacturer to recall the vehicle. 49 U.S.C. §§30102(3), 30102(9), 30118, 30120; 49 C.F.R. §573.6 ("Each manufacturer of a motor vehicle shall be responsible for any safety-related defect or any noncompliance determined to exist in the vehicle.") In other words, the statutes themselves require the manufacturers to exceed FMVSS standards and be responsible for safety-related defects, including recalling vehicles – contrary to what Hyundai argued to the jury.

The amicus parties apparently wish to establish a rule where the plaintiff can offer no evidence to rebut Hyundai's own false statements about the scope, content, and impact of FMVSS. Nothing in the record or court of appeals decision "punishes" manufacturers or questions the "wisdom" of the presumption.[8] Rather, the lower courts made reasoned decisions as to what evidence Vanderventer could

[8] Hyundai received the benefit of a jury instruction to presume that the Elantra was not defective, and Hyundai does not appeal any issue with that instruction. (R1777:17-18.)

introduce to rebut the presumption of non-defectiveness based on the FMVSS standards Hyundai chose to rely on and exaggerate to the jury. Amicus arguments to change the rebuttable presumption into an affirmative defense should be directed toward the Legislature, not this Court.

III. The Legislature's submission supports the court of appeals' decision and shows why further review is unnecessary.

As an initial matter, the Court must exercise some caution to avoid revisionist history by select legislators, many of whom were not elected representatives in 2011. "Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "…[C]ourts should be careful in what they deem acceptable as evidence of legislative intent." *Juneau Cnty. v. Courthouse Emps., Loc. 1312*, 221 Wis. 2d 630, 650, 585 N.W.2d 587, 595 (1998).

> Ours is 'a government of laws not men,' and 'it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.' Antonin Scalia, *A Matter of Interpretation,* at 17 (Princeton University Press, 1997). 'It is the *law* that governs, not the intent of the lawgiver.... Men may intend what they will; but it is only the laws that they enact which bind us.' *Id*.

Kalal, 2004 WI 58, ¶ 52.

However, while the Legislature's brief states it supports review, the substance of the Legislature's submission is relatively generic and accords with the court of appeals decision:

- The legislature confirms no significant statutory construction is necessary and advocates for the courts to "apply[] the plain language" of §§895.047 and 907.02, which the court of appeals certainly did. (Legislature Brief, p.2). The Legislature identifies no particular flaw in the court of appeals' reasoning.

- The Legislature confirms that the goal of the 2011 reforms was not to eliminate legitimate claims, the "goals were to create a more business friendly environment while protecting citizens from defective products…" (Legislature's Brief, p.6). "Act 2 rebalanced tort laws so businesses and citizens had reasonable standards by which to judge potentially defective products." (*Id*., p.9.) The goal was to "cut back on frivolous lawsuits" and "litigation abuse," not to curtail meritorious claims. (*Id*. p.13-14.) A 43% decrease in products liability suits shows the strategy working with weaker cases being weeded out. (Chamber Brief, p 12.) However, it would be contrary to the Legislature's judgment to presume (as the special interest groups advocate) the lower courts misapplied the law simply because the plaintiff won a legitimate case. While the Legislature passed rules to tighten certain requirements, its own brief acknowledges that it meant to preserve remedies for those seriously injured by defective products, as Vanderventer was.
- The Legislature confirms that originally, compliance with government "standards or conditions," was conceived as an affirmative defense, but was later changed to allow claimants to rebut a presumption of non-defectiveness. (*Id*., p.11.) This is precisely how the lower courts applied it. *Vanderventer*, 2022 WI App 56, ¶¶80-92.
- The Legislature points to no statutory provision or legislative history governing recall evidence or what evidence may be introduced to rebut the statutory presumption of non-defectiveness. [9]
- The Legislature confirms that it did not intend to eliminate subsequent remedial measures evidence: "Those remedial measures aren't totally out of a case, however, and can be used only 'to prove a reasonable alternative

[9] The introductory portion of the Legislature's brief mentions, without reference or citation, limitations on recalls. The proposed brief contains no substantive discussion of any limitations on recalls, nor does it point to any legislatively enacted limitations or even legislative history regarding use of recall evidence.

design that existed at the time.'" (Legislature Brief, p.13.) That is exactly how the lower courts applied it here. *Vanderventer*, 2022 WI App 56, ¶¶93-100.

- The Legislature discusses how it wanted to conform Wisconsin's law to other *Daubert* states and have circuit courts perform a reliability analysis of expert witnesses. Again, that is exactly what happened here. *Vanderventer*, 2022 WI App 56, ¶¶70-79.

The Legislature's submission shows that there is no need for further review of this case.

CONCLUSION

Review should be denied because the issues pertain to fact-specific discretionary evidentiary decisions based on a unique record. Wild claims and inflammatory rhetoric cannot transform discretionary rulings into issues of legal significance. That Hyundai and its friends feel compelled to fictionalize the record ultimately reveals the weakness of their position and shows that further review by this Court is not warranted.

Respectfully submitted this 15th day of December, 2022.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the formatting rules for electronic briefs contained in §809.19(8) for a brief produced with a proportional serif font. The length of the brief is 5,371 words.

Dated this 15th day of December, 2022.

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