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,

KAYLA M. SCHWARTZ and COMMON GROUND HEALTHCARE COOPERATIVE,

Defendants.

APPEAL NO. 2020AP001052

ON REVIEW OF A DECISION OF THE COURT OF APPEALS DISTRICT II DATED OCTOBER 26, 2022

AMICUS BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REVIEW

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INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit association of corporate members representing a broad cross-section of product manufacturers.[1] PLAC seeks to contribute to the improvement and reform of law, with emphasis on products liability law. Its perspective comes from corporate membership spanning a diverse group of industries in various facets of the manufacturing sector. Additionally, several hundred leading product litigation defense attorneys are non-voting members. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law.

In 2011, the Wisconsin Legislature made a sea change in Wisconsin products law when it enacted significant reforms including creating a presumption of non-defectiveness when products comply with government standards and restricting the admission of subsequent remedial measure evidence. The circuit court negated these reforms when it admitted irrelevant and highly prejudicial evidence of unrelated recalls and subsequent remedial measures under the guise of rebuttal and impeachment. The court of appeals compounded the error, affirming the ruling in a published decision that transforms reforms intended to protect product manufacturers from the

[1] *See* https://plac.com/PLAC/PLAC/Amicus.aspx

admission of irrelevant and highly prejudicial evidence, into a rule inviting its admission in nearly any products liability case. This is not only contrary to the Legislature's expressed policy decision, it leaves Wisconsin badly out-of-step with the rest of the country.

PLAC's members are interested in ensuring that Wisconsin's statutes are enforced as written, and that tort reforms enacted to promote fairness by restricting the presentation of irrelevant and highly prejudicial evidence are not construed to encourage, rather than prohibit, this evidence.

ARGUMENT

PLAC urges the Court to accept review of this case because the published decision of the court of appeals negates, and indeed undermines, the Wisconsin Legislature's policy decisions and it will have ripple effects across the country. Being permitted to introduce evidence of recalls and subsequent remedial measures is an evidentiary windfall for plaintiffs in a product liability case.[2] This is because their attorneys know that evidence of recalls invites jurors to conclude that a product is defective—either generally faulty or that a specific potential defect identified in a recall is present and manifested in a particular product. And these advocates also understand that they can capitalize on jurors' assumptions that a change in design implies a problem with a previous one. This evidence gilds even the weakest defect claims by encouraging jurors to equate unrelated and assumed product problems with proof of a specific defect and believe that where there is smoke, there must be fire.

For this reason, courts around the country limit the admission of recall and subsequent design change evidence. So do lawmakers—including Wisconsin's. The published decision of the court of appeals in this case, however, turns these policies on their heads, giving trial courts nearly free

[2] Though PLAC addresses only the court of appeals ruling on the admission of recall and subsequent design change evidence, it agrees that review is also warranted on the issue of the admissibility of expert testimony.

rein to admit such evidence based on broadly construed notions of relevance and impeachment.

The Court should grant review to address the interpretation of Wisconsin's product liability law respecting provisions that were enacted in 2011 and have never before been considered by this Court. The Court's decision in this case would develop and clarify important and recurring issues of law that will have statewide—and indeed national—impact. *See* Wis. Stat. § 809.62 (1r)(c)(1), (2), and (3).

I. THE DECISION'S INTERPRETATION AND APPLICATION OF WIS. STAT. § 895.047(3)(B) IS CONTRARY TO THE STATUTE AND PUSHES WISCONSIN FAR OUTSIDE THE MAINSTREAM ON RECALL EVIDENCE.

In 2011, the Wisconsin Legislature enacted wide-ranging tort reforms intended to bring fairness to defendants in products liability cases. Wis. Stat. § 895.047. Section 895.047(3)(b) creates an important, but tailored, protection for manufacturers in providing that evidence that a product "complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency shall create a rebuttable presumption that the product is not defective." That is, if the evidence shows that the ***specific*** product at issue complied with ***relevant*** standards, there is a rebuttable presumption of non-defectiveness.

In the published decision, the court of appeals held in this case that because § 895.047(3)(b) does not specifically state how its presumption can

be rebutted, trial courts are free to admit ***generally*** relevant evidence in rebuttal and not just evidence relevant to rebut the presumed fact. This allows in a universe of irrelevant recall evidence far beyond evidence relevant to the specific presumption in the case. In this case, therefore, it allowed admission of 30 years' worth of recalls that had nothing to do with the vehicle component alleged to be defective – here, the driver's seat in the 2013 Hyundai Elantra.

This rule, which is binding precedent that will remain absent this Court's intervention, conflicts with Wisconsin law, and transforms a modest pro-manufacturer presumption into an enormous penalty for any defendant that tries to rely on it. If this rule is allowed to stand, the negative consequences in Wisconsin courts and across the country are difficult to overstate.

As Defendants-Appellants Hyundai Motor America and Hyundai Motor Company correctly point out, the court of appeals' decision misinterprets Wis. Stat. § 903.01 and its traditional application, which requires that evidence admitted rebutting a statutory presumption rebut the ***presumed*** fact. *See, e.g.*, *Kruse v. Horlamus Indus., Inc.*, 130 Wis. 2d 357, 366, 387 N.W.2d 64 (1986); *In re Interest of Kyle S.G.*, 194 Wis. 2d 365, 374, 533 N.W.2d 794 (1995). Evidence about ***other*** vehicles and components cannot rebut the presumption that the driver's seat ***in the 2013 Elantra*** was non-defective.

But even using the court of appeals' extraordinarily broad general relevance standard, its application to this case is improper because recalls are generally irrelevant absent proof that the product at issue was included in a recall *and* experienced the recall condition. *See, e.g.*, *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 133–34 (6th Cir. 1984); *Vockie v. Gen. Motors Corp.*, 66 F.R.D. 57, 61 (E.D. Pa. 1975), *aff'd*, 523 F.2d 1052 (3d Cir. 1975). Recalls having nothing to do with the alleged defect—and even involving completely different manufacturers and vehicles—do not meet this standard. And contrary to the lower courts' assumptions, it is confusing, a waste of time, and prejudicial to allow courts to receive evidence of other products and other recalls to prove the theoretical possibility that a product that complies with government standards could still exhibit a defect. A presumption may be rebutted by facts that tend to show the presumed fact is not present. And the jury is instructed on how presumptions work. It is no more necessary to present evidence to demonstrate § 895.047(3)(b)'s operation in the abstract—i.e., that it is an assumption that evidence may disprove—than it is necessary to establish that a criminal defendant could still be guilty by presenting evidence that any number of infamous criminals were also presumed innocent. The point of a presumption is that it ***can*** be disproved.

The decision in this case conflicts with the text of Wis. Stat. § 895.047(3)(b) and well-established Wisconsin law. Further, it creates an

absurd result that the Legislature could not have intended. In subsection (3), the Legislature created statutory defenses in products liability. It is inconceivable that in creating the narrowly tailored and modest presumption in favor of a manufacturer in subsection (3)(b), the Legislature also, *silently*, intended to throw open the door for evidence that courts all over the country restrict and exclude as dangerously prejudicial without direct proof of specific relevance. *See Calhoun*, 738 F.2d at 133–34; *Bailey v. Monaco Coach Corp.*, 350 F. Supp. 2d 1036, 1045 (N.D. Ga. 2004), *aff'd.* 168 Fed. Appx. 893 (11th Cir. 2006); *Kane v. Ford Motor Co.*, 450 F.2d 315, 316 (3d. Cir. 1971); *Vockie*, 66 F.R.D. at 61; *Olson v. Ford Motor Co.*, 410 F. Supp. 2d 869, 875 (D.N.D. 2006); *Verzwyvelt v. St. Paul Fire & Marine Ins. Co.*, 175 F. Supp. 2d 881, 889–89 (W.D. La. 2001); *Bagel v. Am. Honda Motor Co., Inc*., 477 N.E.2d 54, 58 (Ill. App. 1985).

The consequences of this case are far-reaching. The decision has, for all intents and purposes, negated § 895.047(3)(b). No rational manufacturer would ever invoke the presumption if the cost is that every irrelevant recall not just in its own corporate history, but in its industry's history, becomes admissible as rebuttal. The decision empowers courts to admit highly prejudicial unrelated recall evidence in any products liability case. If the Wisconsin Legislature had intended to create this broad evidentiary penalty for manufacturers when it granted a modest statutory presumption in their favor, it would have said so.

II. THE DECISION REWRITES WIS. STAT. § 895.047(4) CONTRARY TO ITS PLAIN TERMS AND ADOPTS A NEW RULE CONCERNING SUBSEQUENT DESIGN EVIDENCE THAT IS AN OUTLIER AMONG JURISDICTIONS.

In addition to the statute discussed in part I, another of the Legislature's 2011 reforms to products liability law was to circumscribe the situations in which evidence of a subsequent design change is admissible. Section 895.047(4) permits such evidence only when it "show[s] a reasonable alternative design that existed at the time when the product was sold," and prohibits using such design changes to show "a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction." The decision in this case expanded the situations where subsequent design changes may be admitted far beyond the limits set by the Legislature, allowing evidence of a 2017 Hyundai seat design to show that Hyundai "could have practically adopted" its design when the 2013 vehicle was sold or, in the alternative, to "impeach" under Wis. Stat. § 904.07 testimony that the plaintiffs anticipated might occur. P.App.49 ¶ 96; 54, ¶ 107 (citations omitted).

A. The Court should accept review to interpret Wis. Stat. § 895.047(4).

Review is necessary to clarify the interpretation of Wis. Stat. § 895.047(4) and to affirm the application of its plain language. It is particularly warranted because the decision in this case substantively changes the statute. But that is not the Court's role, as policy "is for the legislature to

establish, and for the legislature alone to amend or change." *Rosenheimer v. Rosenheimer*, 63 Wis. 2d 1, 12, 216 N.W.2d 25 (1974). The courts must "assume that the legislature used all the words in a statute for a reason." *State v. Matasek*, 2014 WI 27, ¶ 18, 353 Wis. 2d 601, 846 N.W.2d 811.

The Legislature included the words "that existed" in § 895.047(4) for a reason, which is illuminated by the context of the statute. Section 895.047 governs lawsuits against manufacturers and distributors of finished products. The difference between a reasonable alternative design "that existed" and an alternative design that "could have" been adopted, is vital. For most products—and particularly for automobiles—while a current model is being sold, manufacturers are already working on the next design. The design and development process involves not just redesigning specific components, but testing, validating, and figuring out how components can function appropriately together. The Legislature chose to permit evidence of only designs that existed and were available for use at the time of sale. The limitation to "exist[ing]" designs encourages manufacturers to prudently investigate and implement new designs, launching them when they are ready. And it prevents plaintiffs, who have the benefit of hindsight rather than the burden of design and risk-assessment, from second-guessing the manufacturer's decisions by arguing that a good design should have been brought to market sooner. This was a wise policy choice—and one for the Legislature alone to make.

B. The Court should grant review to clarify that a broad application of § 904.07 cannot negate § 895.047(4)'s plain language.

In conflict with the narrow language of § 895.047(4), the decision in this case invokes the general evidence rule regarding impeachment, Wis. Stat. § 904.07, to broadly allow admission of subsequent remedial measures evidence. To begin with, because § 895.047(4) specifically governs alternative design evidence, section 904.07's more general rule cannot be used to determine the admissibility of this type of evidence. *See Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 20, 316 Wis. 2d 47, 762 N.W.2d 652 ("As a principle of statutory interpretation, a specific statute generally prevails over a general statute.")

The Court should accept review in this case to clarify the interplay between these specific and general statutes. Section 904.07 permits the admission of "subsequent remedial measures" for impeachment. The decision broadly construes "impeachment" under § 904.07 to include anticipatory impeachment—admitting evidence of a subsequent design under the guise of impeaching testimony that had not yet occurred. But Wisconsin law does not permit anticipatory impeachment. *See Voith v. Buser*, 83 Wis. 2d 540, 544, 266 N.W.2d 304 (1978) ("impeaching evidence to attack credibility is inappropriate and inadmissible prior to the time that any issue of credibility has arisen in the course of trial.")

Besides stretching the term "impeachment" beyond the scope permitted by Wisconsin law, the decision sets courts on a collision course with § 895.047(4) and well-established law about the limits on impeachment evidence across jurisdictions. When plaintiffs can present highly prejudicial subsequent design evidence in opening or their case-in-chief under the guise of "anticipatory impeachment," the defendant is left in an impossible position. It can ignore the evidence—thus leaving the jury with whatever interpretation the plaintiffs choose to put on it. If it chooses to address the evidence, at a minimum, it will draw further attention to it, but could later be argued to have validated the claim of anticipatory impeachment. And if the evidence admitted as anticipatory impeachment does not prove to impeach anything, the recourse will be a limiting jury instruction that cannot unring the bell, or the expense of retrial or appeal.

Permitting subsequent remedial measures evidence for anticipated impeachment is untenable and unfair, and it conflicts with § 895.047(4) —a statute intended to exclude most subsequent design evidence altogether. And for good reason. Courts throughout the country recognize the danger of construing "impeachment" so broadly it swallows the general prohibition and allows plaintiffs to "make devastating use at trial of any measures . . . taken since the accident . . . ." *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 469 (7th Cir. 1984); *Harrison v. Sears, Roebuck & Co.*, 981 F.2d 25, 31 (1st Cir. 1992); *Complaint of Consolidation Coal. Co.*, 123 F.3d 126, 136 (3d Cir.

1997); *Lidle v. Cirrus Design Corp.*, 278 F.R.D. 325, 332 (S.D.N.Y. 2011), *aff'd*, 505 F. App'x 72 (2d Cir. 2012); *City of Richmond, Va. v. Madison Mgmt Grp., Inc.*, 918 F.2d 438, 460, n.21 (4th Cir. 1990); *Minter v. Prime Equip. Co.*, 451 F.3d 1196 (10th Cir. 2006); *Wilkinson v. Carnival Cruise Lines, Inc.,* 920 F.2d 1560, 1567 (11th Cir. 1991).

The danger to product manufacturers is particularly acute, which the Legislature implicitly recognized when it created § 895.047(4) to address this evidence specially in products liability cases. As already noted, only the rare manufacturer will have no overlap between an on-market product and the concepts and preliminary designs that make up a future version. Allowing a broad interpretation of "anticipatory" impeachment would allow the impeachment exception to swallow both the general rule of § 904.07 and the more specific rule of § 895.047(4) in most cases. The Court should grant review to eliminate this confusion and speak to the interplay between section 895.047(4)'s limitation on subsequent remedial measures evidence and section 904.07's allowance of such evidence for purposes of impeachment.

CONCLUSION

PLAC urges the Court to accept review of this case to interpret, clarify, and develop Wis. Stat. §§ 895.047 and 904.07, and to eliminate the confusion caused by the decision in this case, which overrules the Legislature's clear policy choices and leaves the practical application of products liability law in Wisconsin at odds with Wisconsin Statutes and an outlier among jurisdictions.

Dated this 9th 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 for a non-party brief. The length of this brief is 2,691 words.

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