No. 2020AP1052

In the Wisconsin Court of Appeals
District II

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.

On Appeal From The Racine County Circuit Court,
The Honorable Eugene A. Gasiorkiewicz, Presiding
Case No. 2016CV1096

NONPARTY BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND WISCONSIN MANUFACTURERS AND COMMERCE AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLANTS

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INTRODUCTION

In 2011, the Legislature enacted a landmark suite of civil liability reforms. These reforms included bringing Wisconsin in line with the expert testimony admissibility standard under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Wisconsin adopted the *Daubert* standard in part to stem the ongoing flood of meritless products liability lawsuits, which had been stifling the innovation of Wisconsin businesses and harming Wisconsin consumers. Most relevant here, under the *Daubert* standard, a circuit court must provide a critical gatekeeper review, so that unreliable testimony does not infect the jury's deliberations. Here, the circuit court failed to carry out this gatekeeping function with regard to Plaintiffs' two expert witnesses, leading to an unjustified jury verdict. If this Court allows the circuit court's approach to stand, it will undermine the core function of the *Daubert* reliability standard in this State, thereby significantly harming Wisconsin businesses and consumers.

STATEMENT OF INTEREST

Amici are the Chamber of Commerce of the United States of America ("the Chamber") and Wisconsin Manufacturers And Commerce ("WMC"), which both have a direct and substantial interest in this case. *See* Wis. Stat. (Rule) § 809.19(7)(a).

Amicus the Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have a strong interest in proper application of expert-evidence rules like Wis. Stat. § 907.02, which vests the trial court with the "gatekeeper" role and ensures that the jury only sees impartial, sound, and reliable expert evidence. Accordingly, the Chamber regularly files amicus briefs defending the proper application of standards for admitting expert testimony. *See, e.g.*, Am. Br. of the Chamber, et al., *Nemeth v. Brenntag North America*, APL-2020-00122 (N.Y. Oct. 29, 2020); Am. Br. of the Chamber, et al., *Hardeman v. Monsanto Co.*, Nos. 19-16636, -16708 (9th Cir. Dec. 20, 2019); Am. Br. of the Chamber, et al., *Hyundai Motor Co. v. Applewhite*, No. 2015-TS-01886 (Miss. Sept. 19, 2016).

Amicus WMC is Wisconsin's chamber of commerce, manufacturers' association, and safety council. WMC is Wisconsin's largest business trade association with member

businesses of all sizes, across all sectors of the economy, located throughout the State. Since its founding in 1911, WMC has dedicated itself to making Wisconsin the most competitive State in the nation to conduct business. To that end, WMC frequently files amicus briefs in defense of legal rules—such as Wis. Stat. § 907.02—that promote fairness, predictability, and stability in litigation involving businesses. *See generally* WMC, *WMC Litigation Center*.[1]

ARGUMENT

I. The Circuit Court Failed To Carry Out Its Gatekeeping Function Because It Did Not Conduct An Adequate Reliability Analysis

1. Before 2011, Wisconsin was one of the very few jurisdictions that did not require its trial courts to determine, as a threshold matter, whether an expert's testimony was grounded in reliable methodology before that expert's testimony could be placed before a jury. Daniel D. Blinka, *Expert Testimony and the Relevancy Rule in the Age of* Daubert, 90 Marq. L. Rev. 173, 174 (2006) ("Nearly all other jurisdictions impose more formidable thresholds for admissibility.").

In 2011, the Legislature made "the most sweeping changes to products liability law Wisconsin ha[d] ever seen," by, among other things, requiring "a more robust gatekeeping

[1] Available at https://www.wmc.org/issues/wmc-litigation-center/ (all websites last accessed Dec. 23, 2021).

function" to prevent unreliable, junk science from going before juries. Allen C. Schlinsog Jr., *Wisconsin's Tort Reform: A Victory for Manufacturers*, ABA (June 11, 2021).[2] To do that, Wisconsin enacted Special Session Senate Bill 1 ("Act 2"), which included adopting the *Daubert* admissibility standard for expert testimony. *See* Wis. Stat. § 907.02; *260 N. 12th St., LLC v. DOT*, 2011 WI 103, ¶55 n.10, 338 Wis. 2d 34, 808 N.W.2d 372; *State v. Giese*, 2014 WI App 92, ¶ 17, 356 Wis. 2d 796, 854 N.W.2d 687.

Now, when Wisconsin courts evaluate the admissibility of expert testimony, they must determine that the testimony is not only relevant, but also based upon "sufficient facts or data" applied through "*reliable* principles and methods" to the facts of the case, Wis. Stat. § 907.02(1) (emphasis added); Wisconsin Legislative Council Act Memo, 2011 Wisconsin Act 2 (Feb. 1, 2011).[3] As the Supreme Court of Wisconsin has explained, "[i]nstead of simply determining whether the evidence makes a fact of consequence more or less probable, courts must now also make a threshold determination as to whether the evidence is reliable enough to go to the factfinder." *State v. Jones*, 2018 WI 44, ¶ 32, 381 Wis. 2d 284, 911 N.W.2d 97.

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[2] Available at https://www.americanbar.org/groups/litigation/committees/products-liability/articles/2012/wisconsins-tort-reform-victory-manufacturers/.

[3] Available at https://docs.legis.wisconsin.gov/2011/related/lcactmemo/act002.pdf.

2. The requirement that a witness's testimony be reliable is a key component to the court's "gatekeep[ing]" role under Wis. Stat. § 907.02, *id.*, giving "teeth" to the court's mandatory, threshold admissibility inquiry, *Giese*, 2014 WI App 92, ¶ 19; *see* 3 Frumer & Freidman, Products Liability § 18A.04(5) (2021), and thereby "ensur[ing] that the courtroom door remains closed to junk science," *Jones*, 2018 WI 44 ¶ 33 (citation omitted).

To assess the reliability of an expert's proposed testimony, courts typically consider: (1) "whether the evidence can be (and has been) tested;" (2) "whether the theory or technique has been subjected to peer review and publication;" (3) "the known or potential rate of error;" (4) "the existence and maintenance of standards controlling the technique's operation;" and (5) "the degree of acceptance within the relevant scientific community." *Id.* ¶ 33 (citing *Daubert*, 509 U.S. at 593–94). Importantly, circuit courts must be prepared for appellate review of these critical issues and should facilitate such review by creating "a detailed, complete record regarding why any particular expert's testimony meets the heightened scrutiny due under § 907.02." *Seifert v. Balink*, 2017 WI 2, ¶ 189, 372 Wis. 2d 525, 888 N.W.2d 816 (Ziegler, J., concurring).

3. In this case, the circuit court wholly failed to fulfill its "gatekeeping obligation," *id.* ¶ 57, not determining adequately whether the testimony of Plaintiffs' experts—Dr.

Saczalski and Dr. Kurpad—was "the product of reliable principles and methods," Wis. Stat. § 907.02(1).

The circuit court took an especially cavalier approach to assessing the reliability of Dr. Saczalski's methods, failing even to explain whether Dr. Saczalski's methods were reliable, let alone provide the necessary, robust gatekeeping function as to reliability that Wis. Stat. § 907.02 requires. *See Jones*, 2018 WI 44, ¶¶ 27, 32–33. The circuit court generally approved of Dr. Saczalski's "scientific and specialized knowledge," given the court's view of his "education regarding the primary issues of fulcrum, physics, and biomechanical effects." A-App.1493. But the circuit court's analysis of Dr. Saczalski's education establishes his *qualifications*, not the reliability of his methods.

Wisconsin's "heightened standard" requires courts to determine reliability by looking at "whether the testimony is based upon sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the witness has applied the principles and methods reliably to the facts of the case." *Jones*, 2018 WI 44, ¶ 32. The circuit court "listen[ing]" to Dr. Saczalski's analysis and acknowledging what his testing did and did not show, A-App.1494, is entirely insufficient to support a conclusion that his methods are reliable under *Daubert*, *see* Appellants' Br.28–31.

The circuit court's failure to conduct an adequate gatekeeper analysis with regard to Dr. Saczalski undermined

the fairness of the trial in just the way Wis. Stat. § 907.02 was designed to prevent. Because Dr. Saczalski did not use a reliable method such as testing the actual car seat at issue, under conditions similar to those that obtained during the accident, his testimony predictably and inexorably misled the jury into believing that his novel theory was based upon sound science. *See* Appellants' Br.31–41.

As for Dr. Kurpad, the circuit court stated that "this Court is satisfied that based on Kurpad's experience . . . his methodology expressed here has met the *Daubert* and [*Jones*] standards." A-App.1561–62. The circuit court then walked through the *Daubert* factors articulated in *Jones*, A-App.1562–66, and stated that the court was "satisfied that they do not represent full conjecture dressed up in the guise of expert opinion," A-App.1566.

While the circuit court's reliability analysis here was not as conclusory as it was with regard to Dr. Saczalski, it was nevertheless legally inadequate. Again, the circuit court improperly relied on Dr. Kurpad's qualifications as evidence of the reliability of his methods, contrary to Section 907.02 and binding caselaw. *See supra* p.10; Wis. Stat. § 907.02; *Jones*, 2018 WI 44, ¶¶ 32–33. This Court may reverse a circuit court's *Daubert* ruling where, as here, the court "failed to consider the relevant facts" or "failed to apply the proper standard." *Jones*, 2018 WI 44, ¶¶ 27, 33 (applying a de novo standard of review to the question of "whether the circuit court applied the proper legal standard under Wis. Stat.

§ 907.02(1)" (citation omitted)). Further, the circuit court improperly neglected to explain how Dr. Kurpad's biomechanical testimony—which Dr. Kurpad opined on despite the fact that he is not an engineer, while improperly relying upon Dr. Saczalski's testimony—was the product of reliable methods. Instead, the circuit court offered only a general statement regarding the reliability of Dr. Kurpad's testimony as a whole, without explaining the reliability of his biomechanical testimony. *See* Appellants' Br.43–45.

Appellees' defense of the circuit court's reliability analysis is unconvincing. Appellees first cite cases—including out-of-state, trial-level cases—for the unsupported claim that the *Daubert* reliability inquiry, and appellate court review of that inquiry, is insubstantial. Appellees' Br.23–24. But the *Daubert* standard is just the opposite: it is designed precisely to give the circuit court's gatekeeping function meaningful "teeth," *Giese*, 2014 WI App 92, ¶ 19, which appellate courts must then review closely, *Seifert*, 2017 WI 2, ¶ 189 (Ziegler, J., concurring). As to Dr. Saczalski, Appellees appear to admit that the circuit court's reliability analysis was limited only to his qualifications and "listen[ing] to his mathematical analysis, his experience and training." Appellees' Br.25–26 (quoting A-App.1493–94). Contrary to Appellees' contention, Appellees' Br.26, this is not a legally "sufficient" determination of a circuit court's reliability conclusions. *See supra* p.10. And as to Dr. Kurpad, Appellees state that the circuit court found him to be "uniquely

qualified" and recite each aspect of the basis for Dr. Kurpad's testimony. Appellees' Br.36–40. But whether Dr. Kurpad is qualified, as a general matter, does not decide whether his biomechanical methods are reliable, and it is the circuit court's responsibility to determine and explain whether the basis of an expert's opinion is reliable. Wis. Stat. § 907.02(1); *Jones*, 2018 WI 44, ¶¶ 32–33.

II. Failure To Enforce Wis. Stat. § 907.02's Reliability Gatekeeper Threshold Would Harm Wisconsin Businesses And Consumers

Wisconsin Stat. § 907.02 tasks the circuit court with the obligation to prevent the jury from hearing unreliable expert testimony, and thereby protects Wisconsin businesses and consumers from unjustified verdicts based on junk science. Such unjustified verdicts are especially common in high-stakes products liability actions like the present case, where complex data and sympathetic plaintiffs create an especially dangerous risk of undue influence by unreliable plaintiffs' experts. Proper application of Wis. Stat. § 907.02's reliability standard promotes Wisconsin's ability to attract and retain businesses to employ Wisconsin residents, as well as keep prices low for consumers.

Admitting unreliable scientific evidence creates a "major danger" of "mislead[ing] the jury." Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States*, a Half-Century Later*, 80 Colum. L. Rev. 1197, 1237 (1980). Experts can have a powerful impact on jurors because

jurors often view experts with an "aura of 'mystic infallibility,'" regardless of whether the expert's methods are reliable. Gregg L. Spyridon, *Scientific Evidence vs. "Junk Science"—Proof of Medical Causation in Toxic Tort Litigation: The Fifth Circuit "Fryes" a New Test*, 61 Miss. L.J. 287, 305 (1991). This can be a product of jurors' belief that "judges review scientific evidence before it is presented to them, and that any evidence used in a trial must be above some threshold of quality." N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psych. Pub. Pol'y & L. 1, 12 (2009). Given the potential influence that expert testimony can have over jurors' minds, it is of supreme importance that circuit courts exercise their critical gatekeeping functions under *Daubert*, so that jurors are not exposed to "conjecture dressed up in the guise of expert opinion." *Giese*, 2014 WI App 92, ¶ 19.

Enforcing the *Daubert* reliability standard is especially important in high-stakes products liability cases. Such cases often combine large amounts of data incomprehensible to laymen, complex causation theories, and deeply sympathetic plaintiffs who have suffered significant harms. Most jurors will not have the requisite "background of scientific knowledge relevant to the issues being litigated" in a products liability action, Joseph M. Price & Gretchen Gates Kelly, *Junk Science in the Courtroom: Causes, Effects and Controls*, 19 Hamline L. Rev. 395, 397 (1996), making these jurors

susceptible to "biased data," "spurious inference[s]," and occasionally "outright fraud" which define the world of junk science, Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* 2–3 (1991).

Failure to prevent unreliable expert testimony from infecting jury deliberations in Wisconsin would have negative consequences for Wisconsin businesses and consumers, inundating the State with the types of meritless products liability lawsuits that proliferated before Act 2. *See* Allen C. Schlinsog, Jr., *Wisconsin's Tort Reform Four Years Later: A Proven Victory for Manufacturers*, Wis. Def. Couns. J., Spring 2015 (noting that Act 2 reduced the number of products liability cases filed in Wisconsin by 43% as of 2013).[4] A return to widespread proliferation of such lawsuits based on speculative theories of liability would necessarily lead to rising product costs, as businesses would need to pass the costs of their litigation defense and unjustified, massive jury verdicts to consumers through higher prices.

Verdicts stemming from unreliable expert testimony would also "ultimately limit the number of products available to the [ ] consumer," resulting in "safe, valuable products being pulled off the market." Price & Gates Kelly, *supra*, at 398–400; Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and*

[4] Available at https://wdc-online.org/wdc-journal/archived-editions/wisconsins-tort-reform-four-years-later-proven-victory-manuf.

State Courts, 35 Hofstra L. Rev. 217, 224–26 (2006) (discussing the severe repercussions to businesses as a result of litigation theories which were later "thoroughly discredited"). Despite the fact that a product may be beneficial to consumers and entirely sound, an unfounded damage award resulting from a court admitting unreliable expert testimony could "improperly force" a company to abandon the product entirely. Stephen J. Breyer, *Introduction* to Federal Judicial Center, Reference Manual on Scientific Evidence 1, 4 (3d ed. 2011).

Wisconsin courts can prevent these harms by vigilantly applying the *Daubert* standard, consistent with the enactment of Act 2, thereby "excluding unsound scientific opinions and refusing to permit juries to decide cases based upon junk science." Price & Gates Kelly, *supra*, at 406–07. This Court should hold the circuit court accountable to each requirement of Section 907.02, including that expert testimony be "the product of reliable principles and methods," Wis. Stat. § 907.02(1), "fulfill[ing] [its] *Daubert* gatekeeping function . . . [to] assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points towards the right substances and does not destroy the wrong ones," *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 148–49 (1997) (Breyer, J., concurring).

CONCLUSION

This Court should reverse the judgment of the Circuit Court.

Dated: December 23, 2021.

Respectfully submitted,

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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 2,697 words.

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