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 Racine County Circuit Court,
The Honorable Eugene A. Gasiorkiewicz, Presiding.
Case No. 2016CV001096

NONPARTY BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND WISCONSIN MANUFACTURERS AND COMMERCE SUPPORTING THE PETITION FOR REVIEW

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN PEPPER HAMILTON
SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, IL 60606
Telephone: (608) 999-1240
Facsimile: (312) 759-1939
misha.tseytlin@troutman.com

Attorneys for The Chamber Of Commerce Of The United States Of America, The National Association of Manufacturers, and Wisconsin Manufacturers And Commerce

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INTRODUCTION

In 2011, the Legislature enacted landmark civil liability reform, the Omnibus Tort Reform Act, 2011 Wisconsin Act 2, including adopting the expert admissibility standard established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under the *Daubert* standard, circuit courts must now conduct a critical gatekeeper review of expert testimony, to prevent juries from hearing unreliable testimony. This reform was necessary to ensure that Wisconsin has a judicial system that treats litigants fairly, including companies doing business in our State.

In the present case, the Court of Appeals blessed the Circuit Court's failure to carry out its *Daubert* gatekeeping duties. While this legal violation is problematic for Petitioners here—which have to pay out an extraordinary $32 million verdict based upon unreliable testimony—*Amici*'s primary concern is that the Court of Appeals' decision is now binding statewide precedent. Absent this Court's intervention, circuit courts throughout Wisconsin will now know that they can conduct their critical reliability analyses in the utterly insufficient manner that the Court of Appeals blessed below, undermining the environment within which Wisconsin companies do business.[1]

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[1] While *Amici* focus this brief on the Petition's two *Daubert* Issues (Issues IV and V), *Amici* support this Court granting review on all Issues the Petition raises.

STATEMENT OF INTEREST

Amici are the Chamber of Commerce of the United States of America (the "Chamber"), the National Association of Manufacturers ("NAM"), and Wisconsin Manufacturers And Commerce ("WMC"), which have a direct and substantial interest here. *See* Wis. Stat. (Rule) § 809.19(7)(a).[2]

Amicus the Chamber is the world's largest business organization. The Chamber 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 briefs defending legal rules, including expert evidence rules like Wis. Stat. § 907.02, which ensure that juries are only exposed to scientifically backed, impartial, and reliable expert evidence. *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).

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[2] *Amici* the Chamber and WMC previously filed an amicus brief supporting Defendants-Appellants-Petitioners before the Court of Appeals. *See* Am. Br. of the Chamber, et al., *Vanderventer v. Hyundai Motor Am.*, No. 2020AP1052 (Wis. Ct. App. Dec. 23, 2021).

Amicus NAM is the largest manufacturing association in the United States, representing large and small manufacturers in every industrial sector and in all fifty States. Manufacturing employs over 12.9 million Americans, contributes approximately $2.77 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of private-sector research and development. NAM is a voice for the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. NAM frequently files amicus briefs in defense of legal rules that ensure a level playing field for manufacturers. *See* NAM, *NAM Legal Center*.[3]

Amicus WMC is Wisconsin's chamber of commerce, manufacturers' association, and safety council. WMC is Wisconsin's largest business association, representing approximately 3,800 member companies across all sectors of the economy. WMC has served as Wisconsin's business voice since 1911 and seeks to make Wisconsin the most competitive state in the nation to do business. Accordingly, in an effort to serve the public interest and defend the business community, WMC regularly files amicus briefs in defense of legal rules

[3] Available at https://www.nam.org/legal-expertise/legal-center/ (all websites last accessed Dec. 9, 2022).

that promote fairness and predictability in the legal system. *See generally* WMC, *WMC Litigation Center*.[4]

ARGUMENT

I. The Court Of Appeals' Decision Affirming The Circuit Court's Utterly Insufficient Reliability Analysis Establishes A Dangerous Statewide Precedent That Guts Wisconsin's Critical Expert-Testimony Reforms

A. Prior to 2011, Wisconsin was one of the few States that allowed juries to consider expert testimony evidence that had not been subject to a determination as to whether the testimony was reliable. *See* Daniel D. Blinka, *Expert Testimony and the Relevancy Rule in the Age of* Daubert, 90 Marq. L. Rev. 173, 174 (2006).

In 2011, the Legislature adopted the now-current version of Wis. Stat. § 907.02, enacting "the most sweeping changes to products liability law Wisconsin ha[d] ever seen," Allen C. Schlinsog Jr., *Wisconsin's Tort Reform: A Victory for Manufacturers*, ABA (June 11, 2012).[5] This landmark reform included adopting the *Daubert* standard for expert testimony, *see* Wis. Stat. § 907.02; *see also 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, making circuit courts "a [ ] robust gatekeep[er]" to

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[4] Available at https://www.wmc.org/issues/wmc-litigation-center/.

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

prevent unreliable junk science from unduly influencing the minds of jurors, Schlinsog Jr., *supra*. "Instead of simply determining whether the evidence makes a fact of consequence more or less probable, courts [now] 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. To be admissible, expert evidence must be based upon "sufficient facts or data" applied through "reliable principles and methods." Wis. Stat. § 907.02(1).

B. The circuit courts' "gatekeeper" duties give "teeth" to Wis. Stat. § 907.02. *Giese*, 2014 WI App 92, ¶ 19; *see* 3 Frumer & Freidman, Products Liability § 18A.04(5) (2021). To ensure that circuit courts meet this weighty responsibility, this Court has articulated several factors that these courts should use to assess the reliability of an expert's testimony: (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." *Jones*, 2018 WI 44, ¶ 33 (citing *Daubert*, 509 U.S. at 593–94). Further, circuit courts should create "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).

C. The Circuit Court below utterly failed to exercise its "gatekeeping obligation," *id.* ¶ 57, regarding whether the testimony of Plaintiffs' experts was "the product of reliable principles and methods," Wis. Stat. § 907.02(1).

First, presented as Issue IV in the Petition, Pet. 24–28, the Circuit Court failed to assess the reliability of each opinion offered by Plaintiffs' experts, allowing them to extend their testimony beyond their specific fields of expertise. Dr. Saczalski, a biomechanical engineer without any medical expertise, presented testimony regarding not only the purported defects of the headrest at issue, but also an ultimate medical opinion as to the causation of Plaintiff's injury. Specifically, Dr. Saczalski stated that the deformation of the headrest guides "caused [Plaintiff's] paralysis." R.1763:35–36, 134. But the Circuit Court never assessed whether that *medical* opinion, separate from Dr. Saczalski's *biomechanical* testimony, was reliable. To be admissible, each expert opinion must be separately examined; this is especially so, as here, where an expert in one field attempts to offer testimony in another specialty. *See Dura Auto. Sys. Of Ind. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002); *In re Termination of Parental Rights to Daniel R.S.*, 2005 WI 160, ¶ 36, 286 Wis. 2d 278, 706 N.W.2d 269. The Circuit Court ignored its duties, only offering a general statement about Dr. Saczalski's "scientific and specialized knowledge." R.1765:147–50 (opining that the codification of *Daubert* "has not turned out to be a sea of change" since Wisconsin adopted

it). Wis. Stat. § 907.02 demands far more rigor, requiring that each expert opinion be based upon "sufficient facts or data" applied through "reliable principles and methods." *Id.*

Second, and also presented as Issue IV, Pet. 24–28, the Circuit Court allowed Dr. Kurpad, a medical doctor with no engineering expertise, to offer his biomechanical causation theory regarding the various forces from the accident without conducting a sufficiently robust reliability analysis. R.1787:50–51, 65, 86, 124–34; *see* Pet. 26–28. Although the Circuit Court stated that it was "satisfied that based on Kurpad's experience . . . his methodology expressed here has met the *Daubert* and [*Jones*] standards," R.1767:9–10, it failed to conduct any reliability analysis regarding Dr. Kurpad's physics-based causation theory. Circuit courts have the responsibility to determine and explain whether each expert opinion is reliable. Wis. Stat. § 907.02(1); *Jones*, 2018 WI 44, ¶¶ 32–33; *Seifert*, 2017 WI 2, ¶ 189. The Circuit Court here failed to undertake this responsibility, exposing the jury to Dr. Kurpad's unreliable biomechanical testimony.

Third, presented as Issue V in the Petition, Pet. 28–31, the Circuit Court failed to examine how Dr. Saczalski's biomechanical expert testimony was reliable without his ever testing the actual car seat at issue under conditions similar to those that obtained during the accident, *see* R.1765:66; R.1787:241. The Court only recited the *Daubert* factors and praised Dr. Saczalski's "education regarding the primary issues of fulcrum, physics, and biomechanical effects."

R.1765:148. Merely "listen[ing]" to Dr. Saczalski's analysis and mentioning the limits of what his testing can show, R.1765:149, is insufficient to establish that his testimony is based on reliable principles and methods. The Circuit Court's failure is just what Wis. Stat. § 907.02 is designed to prevent: exposing the jury to expert testimony based on unfounded, untested science.

D. The Court of Appeals below fully endorsed the Circuit Court's utterly insufficient reliability analysis as satisfying the Circuit Court's Wis. Stat. § 907.02's responsibilities. *See* Op. ¶¶ 61, 63–65. In light of the Court of Appeals' holding, the Circuit Court's now-affirmed, utterly insufficient view of its gatekeeping duties is binding precedent in the State, *see* Wis. Stat. § 752.41(2); *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997), removing the "teeth" from circuit courts' review, *Giese*, 2014 WI App 92, ¶ 19, and gutting the *Daubert* reliability assessment mandate.

It is thus vital that this Court grant the Petition to overturn the Court of Appeals' blessing of the Circuit Court's utter failure to perform its statutorily-mandated gatekeeper function and "help [ ] clarify" for Wisconsin circuit courts that the requirements of Wis. Stat. § 907.02 must be robustly applied as to each expert opinion offered. *See* Wis. Stat. § 809.62(1r). Allowing the Court of Appeals' published affirmance to remain statewide precedent opens the path to unreliable expert testimony flooding before Wisconsin juries.

This Court's intervention is badly needed to reinforce vigorously the gatekeeping requirements of Wis. Stat. § 907.02 to "ensure that the courtroom door remains closed to junk science." *Jones*, 2018 WI 44, ¶ 33 (citation omitted).[6]

II. It Is Essential To The Welfare Of Wisconsin Businesses And Consumers That Circuit Courts Fulfill Their Gatekeeping Duties As The Legislature Prescribed

A. Section 907.02 protects Wisconsin's businesses and consumers from the risk of jury verdicts tainted by junk science. Unjustified verdicts are especially prevalent in products-liability cases, where the combination of sympathetic plaintiffs and complex scientific evidence makes jurors susceptible to the influence of unreliable expert testimony. Wisconsin's ability to attract and retain businesses, employ Wisconsin residents, and maintain low prices for Wisconsin consumers depends on faithful adherence to Wis. Stat. § 907.02's evidentiary requirements.

Resolution of products-liability lawsuits typically depends on the interpretation of complicated, scientific evidence; therefore, testimony derived from unreliable

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[6] It is irrelevant that the Court of Appeals conducted, in the alternative, an "independent review" of the expert testimony at issue here to "confirm[ ] the reasonableness of the [Circuit] [C]ourt's determination." Op. ¶ 62. That independent review—the substance of which *Amici* strongly disagree, and which this Court can address as part of its own merits review—is analytically separate from the Court of Appeals' blessing of the Circuit Court's reliability analysis as sufficient, which affirmance is now binding, statewide precedent. Op. ¶ 61.

scientific methodology poses "major danger" to the integrity of jury verdicts. *See Paul C. Giannelli, The Admissibility of Novel Scientific Evidence:* Frye v. United States*, A Half-Century Later*, 80 Colum. L. Rev. 1197, 1237 (1980); U.S. Chamber of Comm. Inst. For Legal Reform, Nuclear Verdicts: Trends, Causes, Solutions 42–43 (Sep. 2022)[7] (finding that many "nuclear verdicts" involve the admission of scientific evidence and usually "turn on whether a jury believes an expert with respect to key issues"). Expert testimony is often accompanied by "an aura of scientific infallibility" because most jurors believe 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." *Giannelli, supra* at 1237. As a result, expert testimony frequently "lead[s] the jury to accept [evidence] without critical scrutiny," *id.*, regardless of whether the testimony is derived from reliable methodology, 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); 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); *see also* U.S. Chamber of Comm. Inst. For Legal Reform, Fact or Fiction: Ensuring the

[7] Available at https://instituteforlegalreform.com/wp-content/uploads/2021/02/Expert-Testimony-Paper-FINAL.pdf.

Integrity of Expert Testimony 4 (Feb. 2021)[8] (expert testimony can be "particularly powerful and misleading" because by design, expert testimony "often addresses unfamiliar and esoteric fields" and is not limited by evidentiary rules applicable to lay witnesses).

In light of the tendency of jurors to accept expert testimony "without critical scrutiny," *Giannelli*, *supra* at 1237, faithful adherence to *Daubert* and Wis. Stat. § 907.02's reliability standard before a jury sees expert testimony is especially necessary in high-stakes products-liability cases like this one. These cases often involve sympathetic plaintiffs, complicated technical data, and complex causation theories. The average juror does not have "scientific knowledge relevant to the issues being litigated" in such cases, Joseph M. Price & Gretchen Gates Kelly, *Junk Science in the Courtroom: Causes, Effects and Controls*, 19 Hamline L. Rev. 395, 397 (1996), making them exceptionally susceptible to the hallmarks of junk science—"biased data," "spurious inference[s]," and occasionally, "outright fraud"—that poison an unreliable expert's conclusions, Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* 2–3 (1991).

B. "[E]nsur[ing] that the courtroom door remains closed to junk science," *Jones*, 2018 WI 44, ¶ 33 (citation omitted), is critical to keeping Wisconsin an attractive destination for

[8] Available at https://instituteforlegalreform.com/wp-content/uploads/2021/02/Expert-Testimony-Paper-FINAL.pdf.

businesses and to protect its residents from rising consumer costs. The Circuit Court's now-affirmed failure to carry out its gatekeeping function erodes Wis. Stat. § 907.02's safeguards, contravenes legislative intent, and frustrates these important State goals. Notably, permitting circuit courts to forgo thoroughly scrutinizing an expert witness's reliability diminishes the burden on products-liability plaintiffs and would once again inundate the State's courts with meritless lawsuits. *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, as of 2013, Wisconsin experienced a 43% decrease in products liability cases filed since the passage of Act 2).[9] In turn, rising litigation costs and the risk of satisfying massive unjustified jury verdicts will force businesses to pass on those expenses to consumers. Those risks will also discourage businesses from coming to Wisconsin in the first place and force existing businesses to relocate to other jurisdictions, depriving the State of jobs and tax revenue.

Failure to apply properly Wis. Stat. § 907.02's safeguards will also "limit the number of products available to . . . consumer[s]," because businesses may pull "safe, valuable products" from the market rather than risk

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[9] Available at https://www.mondaq.com/unitedstates/product-liability-safety/392446/wisconsins-tort-reform-four-years-later-a-proven-victory-for-manufacturers.

unpredictable litigation. Price & Gates Kelly, *supra*, at 398–400; *see* Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 224–26 (2006). Indeed, even the potential of an unfounded jury award based on unreliable expert testimony could "improperly force" a business to abandon a beneficial product that is, in fact, completely sound. Stephen J. Breyer, *Introduction* to Federal Judicial Center, Reference Manual on Scientific Evidence 1, 4 (3d ed. 2011); Fact or Fiction, *supra* at 27 ("When courts do not demand that experts . . . support their conclusions with sound scientific evidence, they present an opportunity for unwarranted mass tort litigation that imposes defense costs and liability that can drive products from the market.").

C. This Court should grant the Petition to hold Wisconsin circuit courts accountable to each requirement of Wis. Stat. § 907.02, especially that expert testimony be "the product of reliable principles and methods." Wis. Stat. § 907.02(1). The Circuit Court here violated this critical duty, *see supra* Part I.3, thereby failing to "fulfill[ ] [its] *Daubert* gatekeeping function . . . [necessary to] help 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). By affirming the Circuit Court's decision to allow Plaintiffs' experts to testify without

meaningfully probing the reliability of their conclusions, the Court of Appeals permitted circuit courts throughout Wisconsin to refuse similarly to heed their gatekeeping duties under Wis. Stat. § 907.02, to the considerable detriment of Wisconsin's business community and consumers.

CONCLUSION

This Court should grant the Petition.

Dated: December 9, 2022.

Respectfully submitted,

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

Attorneys for The Chamber Of Commerce Of The United States Of America, The National Association of Manufacturers, and Wisconsin Manufacturers And Commerce

CERTIFICATION

I hereby certify that this Nonparty Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a Nonparty Brief produced with a proportional serif font. The length of this brief is 2,991 words.

Dated: December 9, 2022.

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12), AND OF SERVICE

I hereby certify that:

I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Brief filed with the Court and served on all opposing parties.

Dated: December 9, 2022.

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com