IN THE SUPREME COURT OF WISCONSIN
Appeal No. 2020AP1052

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 PETITION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS OF WISCONSIN (Appeal No. 2020AP1052)

BRIEF OF NON-PARTY WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in state courts urging exclusion of scientifically unreliable expert evidence. *See Walsh v. BASF Corp.*, 234 A.3d 446 (Pa. 2020); *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018). WLF's Legal Studies Division, its publishing arm, also publishes articles on the proper reliability threshold for expert testimony. *See, e.g.*, Kirby T. Griffis, *The Role of Statistical Significance in "*Daubert*"/Rule 702 Hearings*, WLF WORKING PAPER (March 2017). WLF believes that this Court's intervention is necessary to ensure that lower courts apply the *Daubert* standard correctly, in accord with Wisconsin law, to bar parties from presenting junk science to juries.

INTRODUCTION

Eleven years ago, the Wisconsin Legislature modified the state's substantive tort law. The admission of evidence that confused jurors, combined with unreliable science from court-approved experts, led to jury verdicts that bore no relation to any injuries the plaintiffs suffered.

That, in turn, led to settlement pressure on companies sued in Wisconsin state court.

The 2011 tort reform should have been a boon for business in the State. If applied correctly, the changes would have assuaged businesses' concerns about facing large jury verdicts by doing business in Wisconsin. Unfortunately, those benefits have yet to fully materialize in the eleven years since tort reform passed.

Some Wisconsin trial courts and the Court of Appeals continue to ignore the new rules and apply old standards for expert evidence that were among the most lax in the nation. This is the worst type of judicial activism. Before 2011, this State's courts liberally allowed the introduction of junk science. The Senate and Assembly, who have all legislative power, *see* Wis. Const. art. IV, § 1, made a policy decision to change the law. The Governor signed that legislation, giving it the force of law, *see* Wis. Const. art. V, § 10. The new statute requires that circuit courts act as strict gatekeepers when evaluating proposed expert testimony. Rather than abide by the new statute's expert-evidence rules, some lower courts have continued instead to apply the now-superseded

rules, and the Court of Appeals' decision in this case endorses that approach.

One reason that lower courts continue to apply pre-2011 Wisconsin law about expert evidence is this Court's dearth of case-law applying the *Daubert* standard. Only twice since 2011 has this Court examined the admission of expert evidence, and one of those decisions failed to garner a majority. This case presents the perfect opportunity for the Court to instruct lower courts on how to properly evaluate expert evidence. It should seize that chance.

STATEMENT

For purpose of this *amicus* brief, the pertinent facts are as follows. Kayla Schwartz was traveling at about forty miles per hour when she rear-ended a 2013 Hyundai Elantra driven by Edward A. Vanderventer, Jr. Although the Elantra's three passengers were uninjured, Mr. Vanderventer suffered a fractured spinal cord; he is now a paraplegic. The difference in injuries was not random; Mr. Vanderventer unknowingly suffered from diffuse idiopathic skeletal hyperostosis. This made his spine more susceptible to fractures than others, including the Elantra's passengers.

Mr. Vanderventer and his wife sued Hyundai, alleging strict liability and negligent design of the Elantra's driver seat. Their theory was that the prongs in the headrest caused Mr. Vanderventer's spinal fracture. They claimed that the headrest rotated around the crossbar near the top of the seat when his head hit the headrest. This pivoting caused the prongs to move forward, creating a fulcrum that led to the fracturing of Mr. Vanderventer's spine.

To support their novel theory, Plaintiffs sought to admit two experts' opinions. Dr. Saczalski was their biomechanical expert who devised the theory of how the injury occurred. He decided, however, not to test his theory; doing so would show that it was unreliable.

Mr. Vanderventer's treating physician, Dr. Kurpad, was the second expert witness. Besides testifying about the injuries that Mr. Vanderventer suffered during the crash, Kurpad also testified about the biomechanics involved with the car crash. He opined that Saczalski's untested theory about the prongs of the headrest causing Mr. Vanderventer's injuries was correct.

The Circuit Court denied Hyundai's motion to exclude both expert opinions. At the end of the trial, a jury ordered Hyundai to pay over $32

million in damages; the Circuit Court denied post-trial motions. Hyundai now seeks this Court's review after the Court of Appeals affirmed.

ARGUMENT

Hyundai and the other *amici* persuasively explain why this Court should grant review on other issues, including whether the Circuit Court erred by admitting subsequent-remedial-measures evidence and recall evidence. This brief, however, focuses on why the Court should grant review on the expert-evidence issue.

This Court's Review Is Necessary To Vindicate The Legislature's 2011 Amendments On Expert Evidence.

Before 2011, "a witness qualified as an expert by knowledge, skill, experience, training, or education, [could] testify thereto in the form of an opinion or otherwise." Wis. Stat. § 907.02 (2009-10). "This was a liberal standard." *In re Commitment of Jones*, 2018 WI 44, ¶ 6, 381 Wis. 2d 284, 911 N.W.2d 97. "[Q]uestions of the weight and reliability of relevant evidence [were] matters for the" jury. *State v. Fischer*, 2010 WI 6, ¶ 7, 322 Wis. 2d 265, 778 N.W.2d 629. Circuit courts had broad discretion to admit expert evidence "if the witness [was] qualified to testify and the testimony would help the [jury] understand the evidence

or determine a fact at issue." *State v. Kandutsch*, 2011 WI 78, ¶ 26, 336 Wis. 2d 478, 799 N.W.2d 865.

That changed with passage of the Omnibus Tort Reform Act, 2011 Wis. Act 2. Among other things, the Act adopted the federal standard for admission of expert evidence. *See id.* §§ 34m, 37 (codified at Wis. Stat. § 907.02(1)). Unlike most legislation dealing with procedural rules, "[t]he controversial bill generated heated debate from the moment it was introduced." Adam Korbitz, *Governor signs controversial tort reform bill into law*, State Bar of Wis. (Jan. 27, 2011), https://bit.ly/3EqclIe. Many different voices were heard—both for and against the proposed changes—before the Act passed. *See id.* ("In a measure opposed by the State Bar's Board of Governors, the new law also conforms Wisconsin law on the opinions of lay and expert witnesses to Federal Rule of Evidence 702 and the so-called *Daubert* standard.").

In other words, the Legislature fully considered and rejected opponents' objections to adopting the *Daubert* standard. Over the past eleven years, attorneys have had some success in convincing trial courts to continue to apply the pre-2011 rule and treat challenges to experts' qualifications and methodologies as going to the weight of the evidence

rather than going to the admissibility of that evidence. Not only is this wrong from a textual matter, evidence shows that it is wrong as a practical matter too.

A. Cross-Examination Cannot Replace The Court's Gatekeeping Function.

In denying the motion to exclude the two experts' testimony, the Circuit Court noted that Hyundai would still have the chance to cross-examine the experts about their qualifications and methodology. In other words, the Circuit Court treated these issues as going to the weight of the experts' testimony rather than the admissibility of the testimony. This misapplication of the *Daubert* standard will continue unless this Court intervenes and instructs lower courts to act as a gatekeeper when considering expert evidence.

Dismissing objective flaws in expert evidence as going to the "weight" of that evidence to be explored on cross-examination leaves jurors with the rarified task of resolving the basic reliability of a given expert's testimony. Jurors cannot and should not be expected to make those sorts of reliability determinations.

"The mythic status of cross-examination in this regard actually impedes accurate fact-finding because leading questions are not always

an appropriate or sufficient tool for truth finding." Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk,"* 14 Widener L. Rev. 427, 437 (2009). In other words, the mere "fact that an expert witness was 'subject to a thorough and extensive examination' does not ensure the reliability of the expert's testimony; such testimony must still be assessed before it is presented to the jury." *Nease v. Ford Motor Co.*, 848 F.3d 219, 231 (4th Cir. 2017) (citation omitted).

It's no surprise, then, that legal scholars insist that "cross-examination does little to affect jury appraisals of expert testimony." Christopher B. Mueller, Daubert *Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 Seton Hall L. Rev. 987, 993 (2003). In fact, jurors assume that, because the trial judge admitted the expert evidence, it must have passed at least some degree of scientific scrutiny. *See, e.g.*, N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol. Pub. Pol'y & L. 1, 7 (2009). That is why it is critical for circuit courts to act as gatekeepers

and exclude junk science from the courtroom. Otherwise, jurors assume that any expert testify is reliable.

B. Experts May Not Offer Opinions When They Lack Qualifications In A Discipline.

Kurpad is a physician who treats patients. He lacks any training or education in the biomechanics of car accidents. Yet the Circuit Court allowed him to bolster Saczalski's testimony on specific causation. The Court of Appeals affirmed that ruling. This was error that deserves this Court's review.

Even assuming that Kurpad was properly admitted as an expert on the treatment of Mr. Vanderventer's injuries, that does not mean that he was qualified to offer expert opinions on any issue. As one court succinctly held, "a person qualified to give an opinion on one subject is not necessarily qualified to opine on others." *United States v. Alo-Kaonohi*, 2022 WL 10082094, *2 (D. Haw. Oct. 17, 2022) (cleaned up).

Under *Daubert*, "the court must determine whether the witness is qualified to testify as an expert 'by knowledge, skill, experience, training, or education' *on the subject matter in question*." *Quad City Bank & Trust v. Jim Kircher & Assocs.*, 804 N.W.2d 83, 92 (Iowa 2011) (emphasis

added). Otherwise, parties could hire cheap experts in one field and then have them offer expert opinions in a completely different field.

An example proves the point. Imagine that a party wants to hire an expert to testify in a case challenging the patent for a machine that makes baseballs. Although Dr. Meredith Wills is a renowned astrophysicist whose recent research has focused on baseballs and whether Major League Baseball changed the baseball without notifying the public, she is not an expert on mechanical engineering as would be necessary to testify in the patent case. So it would be wrong for a court to admit her to testify on such issues even though her knowledge about baseballs and how they are made—currently by hand—is closely linked to the issue in the patent case. They are still two separate disciplines, and Dr. Wills is not an expert in the relevant discipline. *See Combs v. Norfolk & W. Ry. Co.*, 507 S.E.2d 355, 358 (Va. 1998) ("The fact that a witness is an expert in one field does not make him an expert in another field, even though that field is closely related."); *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 642 (S.D.N.Y. 2007); Naomi Oreskes & Erik M. Conway, MERCHANTS OF DOUBT: HOW A HANDFUL OF

SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 271 (2010) ("An all-purpose expert is an oxymoron.").

So too here. The issues about how the seat was designed and acted during the crash are linked to the injuries that Mr. Vanderventer suffered during the crash. But that does not mean that Kurpad—a medical doctor lacking biomechanical expertise—was qualified to offer specific-causation testimony about how the prongs in the back of the headrest caused Mr. Vanderventer's injuries. Yet that is what the Circuit Court and the Court of Appeals blessed here. This Court's review is urgently needed to correct the lower courts' continued misapplication of the *Daubert* standard.

Courts have applied this general rule to the specific context of medical doctors testifying about specific medical issues. Although "[a] medical expert, otherwise qualified, is not barred from testifying merely because he or she is not engaged in practice as a specialist in the field about which his or her testimony is offered . . . it is clear that a medical expert may not testify about any medical subject without limitation." *Kiser v. Caudill*, 557 S.E.2d 245, 249 (W. Va. 2001) (*per curiam*) (quotation omitted). If medical doctors cannot testify about any medical

subject without limitation, surely they cannot testify about non-medical issues like biomechanics.

This Court's intervention is needed to instruct lower courts on the best practice for deciding whether an expert witness is qualified to offer an expert opinion on an issue. Besides the other *Daubert* requirements, courts must "compare the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony." *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004). If there is a mismatch, the expert must be barred from testifying outside his or her area of expertise. *See Haimdas v. Haimdas*, 2010 WL 652823, *2 (E.D.N.Y. Feb. 22, 2010) (citing *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 80 (2d Cir. 1997)).

If "an expert is admitted under [*Daubert*] and then purports to offer opinions beyond the scope of his expertise," circuit courts should strike the testimony. *Davis v. Carroll*, 937 F. Supp. 2d 390, 413 (S.D.N.Y. 2013); *see Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356 (Fed. Cir. 2008) (such testimony "amounts to nothing more than advocacy from the witness stand"). That did not happen here. The Circuit

Court permitted Kurpad to offer testimony far beyond his area of expertise.

The error here was even more troubling because Saczalski did not apply a reliable methodology to the facts here. Rather, he realized that a reliable methodology would show that Plaintiffs' theory of the case was bunk. The extra testimony from Kurpad—which amounted to vouching for Saczalski—carried significant weight for the jury. This Court's review is necessary to ensure that this error does not occur moving forward.

C. *Daubert* Requires Application Of Reliable Methodology To The Facts Of A Case.

The reliability of scientific opinion evidence rests not only on the validity of an expert's underlying methodology but also on the expert's proper *application* of that methodology in reaching a given conclusion. After all, neither an invalid methodology nor a valid methodology improperly applied will yield reliable results. Properly applied, *Daubert* ensures that every component of expert evidence—the expert's conclusion, methodology, and reasoning—satisfies the goal of admitting only reliable evidence to the trier of fact.

Experts may not simply invoke reliable scientific techniques without also showing that they faithfully applied those techniques.

Daubert ensures the reliability of expert evidence by clarifying that "*any* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994). This is true "whether the step completely changes a reliable methodology or merely misapplies that methodology." *Id.* Because *Daubert* recognizes that "conclusions and methodology are not entirely distinct from one another," circuit courts should never "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Rather, if the court concludes "that there is simply too great an analytical gap between the data and the opinion proffered," it must exclude that opinion. *Id.*

"[S]omething doesn't become scientific knowledge just because it's uttered by a scientist, nor can an expert's self-serving assertion that his conclusions were derived by the scientific method be deemed conclusive." *Hughes v. Kia Motors Corp.*, 766 F.3d 1317, 1328 (11th Cir. 2014). Saczalski failed to properly apply his methodology to the facts here. This is shown by his not testing his theory.

Plaintiffs' counsel tested an old Elantra seat. But neither they nor Saczalski tested the seat in the vehicle that Mr. Vanderventer was driving. Because Saczalski was being paid to provide Plaintiffs with a winning theory, he cobbled together a theory of how a defective seat allegedly caused Mr. Vanderventer's injuries without undertaking the testing necessary to confirm his novel theory. Saczalski avoided this testing, a crucial part of any reliable methodology, so that he could rely on back-of-the-envelope calculations for his opinion. These calculations did not account for all necessary factors. But *Daubert* and Wisconsin law bar this failure to apply a reliable methodology to the facts of a case. The Circuit Court and Court of Appeals erred by not applying this part of *Daubert* to Saczalski's testimony.

* * *

"This court has long held that it is the province of the legislature, not the courts, to determine public policy." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 539, 576 N.W.2d 245, 252 (1998). Eleven years ago, the Legislature made a policy decision to require that expert opinions comply with the *Daubert* standard. Some lower courts, however, have decided to reject this policy decision in favor of applying the pre-*Daubert* standard.

This Court should grant the petition so that it can remind lower courts of who makes public policy in Wisconsin.

CONCLUSION

This Court should grant the petition.

Dated this 8th day of December, 2022.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

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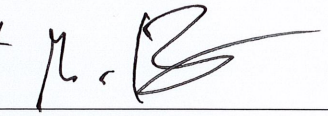
BY: 

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