

8th Circuit reinstates plaintiffs' experts, revives 3M Bair Hugger litigation

August 16, 2021. In *Amador v. 3M Co. (In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.)*, __ F.4th __, 2021 U.S. App. LEXIS 24255 (8th Cir. 2021), the Eighth Circuit Court of Appeals (Judges Gruender, Kelly and Graszyk) reversed a grant of summary judgment that favored defendant 3M, reviving plaintiffs' negligence and strict liability claims in a Multidistrict Litigation (MDL) involving nearly 6,000 lawsuits. The decision hinged on the Eighth Circuit's reversal of the MDL court's exclusion of plaintiffs' expert witnesses.

Plaintiffs allege that they suffered periprosthetic joint infections (PJIs) due to the use of 3M's Bair Hugger device during orthopedic-implant surgeries. The Bair Hugger is "a forced-air device used to keep patients warm during surgery so as to stave off hypothermia-related complications that can arise during or after surgery." Plaintiffs allege that the forced-air warming device introduced microbes into the surgical site during surgery, either by creating "currents that carry ambient bacteria from nonsterile areas of the operating room to the surgical site" ("airflow disruption" theory) or by blowing bacteria present inside the device out into the operating room ("dirty machine" theory), and thereby caused the PJIs.

3M moved to exclude plaintiffs' general-causation medical experts (experts offering "opinions that the Bair Hugger 'is capable of causing the [PJIs] from which' Plaintiffs allegedly suffered") and engineering experts, and for summary judgment. The MDL court (Judge Joan Ericksen) denied the motions but, after a jury verdict in favor of 3M in the first bellwether trial, 3M moved for reconsideration and the MDL court granted 3M's motions, entering an MDL-wide summary judgment.

On appeal, the Eighth Circuit considered the standard for the reliability inquiry of the *Daubert* test for proposed expert testimony. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The Eighth Circuit noted the "intriguing juxtaposition" between its deferential standard of review and the "liberal thrust" of Federal Rule of Evidence 702, regarding the admissibility of expert testimony, as well as the general rule that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility."

Regarding plaintiffs' engineering expert, the MDL court excluded the expert "for opining" without support that "additional real-world conditions" in an operating room would exaggerate the impact of the Bair Hugger device. The Eighth Circuit affirmed the exclusion of this testimony but did "not affirm the MDL court's categorical exclusion of [the expert] and his model." The MDL court found, and the parties agree, "that the physics underlying" his model are reliable. Consequently, as "properly limited," the expert testimony is admissible. The Eighth Circuit also noted the MDL court's concern that the model was developed for litigation, and stated, "[i]n these circumstances—where a 'hired gun' expert's work has been peer reviewed and published, and the developed-for-litigation concern is the only remaining reason for excluding the testimony—we conclude that lingering questions of reliability and objectivity go to weight rather than admissibility."

Regarding plaintiffs' general-causation medical experts, the MDL court determined "that 'too great an analytical gap' existed between 'the literature' and" the experts' opinions. The Eighth

Circuit disagreed, focusing on the “totality of the evidence,” rather than the experts’ “failure to adequately address” the “limitations” of a particular study. The court found that it was not “*per se* unreliable for an expert to draw an inference of causation from an epidemiological study that disclaimed proving causation,” and “[s]o long as an expert does the work ‘to bridge the gap between association and causation,’ a study disclaiming having proven causation may nevertheless support such a conclusion.” Based on the engineering expert’s “properly limited” testimony and model, and other published studies and reports, the court concluded that the experts’ opinions on both of plaintiffs’ general-causation theories were not “so fundamentally unsupported that they should be excluded.” While acknowledging weaknesses in the experts’ theories, the court stated “that deficiencies in an expert’s factual basis go to weight and not admissibility,” and “redress for such weaknesses lies in cross-examination and contrary evidence rather than exclusion.”

The Eighth Circuit also refused to exclude the general-causation medical experts based on a “lack of general acceptance of the causal inferences made by the experts,” noting that “[t]o exclude the experts’ opinions here because their conclusions lacked general acceptance would be to take a side on an issue that is ‘currently the focus of extensive scientific research and debate.’” In light of the reinstatement of plaintiffs’ experts, the Eighth Circuit reversed the MDL court’s grant of summary judgment.

The day after deciding *Amador*, the Eighth Circuit affirmed a jury verdict in favor of 3M in the only Bair Hugger case tried to date. *Gareis v. 3M Co.*, ___ F.4th ___, 2021 U.S. App. LEXIS 24473 (8th Cir. 2021). *Gareis* did not raise any of the expert witness issues addressed in *Amador*.

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