

3M Asks the Supreme Court To Review Eighth Circuit Decision Allowing Expert Testimony in Surgical Warming Blanket MDL

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Earlier this month, 3M filed a petition for writ of certiorari requesting that the U.S. Supreme Court review an Eighth Circuit opinion reversing the district court and allowing expert testimony in a lawsuit involving 3M's commonly used surgical warming blankets. *In re Bair Hugger Forced Air Warming Devices Prod. Liab. Litig.*, 9 F.4th 768 (8th Cir. 2021).

In *In re Bair Hugger*, plaintiffs allege that they suffered periprosthetic joint infections from the use of 3M's surgical warming blanket, known as the Bair Hugger, during their orthopedic-implant surgeries. *Id.* at 773-74. The lawsuits, now nearly 6,000 in total, were consolidated into an MDL before the District of Minnesota. *Id.* at 774. At the close of discovery, 3M moved to exclude plaintiffs' three general-causation medical experts and their engineering expert. *Id.* at 775. The district court denied 3M's motion to exclude and proceeded with the first bellwether trial. *Id.* After a two-week trial resulting in a jury verdict for 3M, 3M moved for reconsideration of the district court's decision on its motion to exclude the expert testimony. *Id.* The district court granted 3M's motion and excluded plaintiffs' experts because it found "too great an analytical gap between the literature and the experts' general causation opinions." *Id.* at 775-76.

On appeal, the Eighth Circuit Court of Appeals reversed the district court's decision. While the Eighth Circuit agreed that "there are weaknesses in the factual basis for Plaintiffs' medical experts' general-causation opinions," it nevertheless held that "the MDL court committed a clear error of judgment on the basis of the record before it in finding that the experts' general-causation opinions were so fundamentally unsupported that they had to be excluded." *Id.* at 787-88.

3M now petitions for writ of certiorari before the U.S. Supreme Court.

First, 3M argues that the standard of admissibility of expert testimony applied by the Eighth Circuit—the "so-fundamentally-unsupported" that "it can offer no assistance to the jury" standard—is an incorrect standard predating Supreme Court precedent in *Daubert*,^[1] *Joiner*,^[2] and the revisions to Federal Rule of Evidence 702. Pet. at 19-28. Such a lax standard of admissibility, 3M argues, incorrectly conflates relevancy with reliability, essentially eliminating the reliability requirement articulated in *Daubert* and reaffirmed in *Joiner*. *Id.* at 20-21. Under this standard, "expert testimony *must* be admitted unless it is 'so fundamentally unsupported by its factual basis that it can offer no assistance to the jury.'" *Id.* at 21. As a result, "testimony that is fundamentally unsupported," should nonetheless "be

admitted because it provides the jury some minimal assistance.” *Id.* Such an approach, 3M argues, “flies in the face” of Rule 702, *Daubert*, and *Joiner* and is not employed by any other circuit court. *Id.* at 24-26.

Second, 3M argues that the Eighth Circuit applied an insufficiently deferential standard of appellate review for district court decisions excluding expert testimony. *Id.* at 28. While the Eighth Circuit recognized “abuse-of-discretion” as the correct standard, it nevertheless “highlighted an ‘intriguing juxtaposition’ between that deferential standard of review and the ‘liberal thrust’ of Rule 702 regarding the admissibility of expert testimony.” *Id.* at 28-29 (citations omitted). However, 3M argues this was the “exact error” the Supreme Court reversed in *Joiner*, and it results in the Eighth Circuit “systematically overrid[ing] the District Court’s judgment calls” and “vitiat[ing] the district court’s role as a gatekeeper.” *Id.* at 30-31.

This case “presents a textbook example of the ‘engine of tort liability’ gone awry,” 3M argues, and “if left to stand, the Eighth Circuit’s decision will ‘generate strong financial incentives’ to ‘reduce’ or ‘eliminate’ production of items, including important medical devices, that are safe and effective.” *Id.* at 34 (citations omitted).

The admissibility of expert testimony is a central—and sometimes dispositive—issue in numerous product liability cases, including many large MDLs. Thus, any action by the Supreme Court on this issue could have a serious impact on how these cases are litigated by parties and how trial courts decide expert admissibility, especially courts within the Eighth Circuit.

¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

² *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

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