United States Court of Appeals
For the Eighth Circuit

No. 19-2899

In re: Bair Hugger Forced Air Warming Devices Products Liability Litigation

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George Amador

Plaintiff - Appellant

v.

3M Company; Arizant Healthcare, Inc.

Defendants - Appellees

Appeal from United States District Court
for the District of Minnesota

Submitted: March 16, 2021
Filed: August 16, 2021

Before GRUENDER, KELLY, and GRASZ, Circuit Judges.

GRUENDER, Circuit Judge.

In December 2015, the Judicial Panel on Multidistrict Litigation created and centralized the *In re Bair Hugger Forced Air Warming Devices Products Liability Litigation* ("MDL") in the District of Minnesota ("MDL court") for coordinated

pretrial proceedings. Plaintiffs[1] in the MDL have brought claims against 3M Company and its now-defunct, wholly owned subsidiary Arizant Healthcare, Inc. (collectively, "3M"). Plaintiffs assert that they contracted periprosthetic joint infections ("PJIs") due to the use of 3M's Bair Hugger, a convective (or "forced-air") patient-warming device, during their orthopedic-implant surgeries. In July 2019, on 3M's motion, the MDL court excluded Plaintiffs' general-causation medical experts as well as one of their engineering experts, and it then granted 3M summary judgment as to all of Plaintiffs' claims. Subsequently, the MDL court entered an MDL-wide final judgment.

Plaintiffs appeal. First, they argue that the MDL court abused its discretion in excluding their general-causation medical experts and engineering expert. Second, they argue that the MDL court erred in granting 3M summary judgment whether or not those experts were properly excluded. Third, they argue that the MDL court abused its discretion in denying Plaintiffs' request for certain discovery. And fourth, they argue that the MDL court abused its discretion in ordering certain filings on its docket to remain sealed. Additionally, on appeal, Plaintiffs ask us to unseal those parts of the appellate record that duplicate the filings whose sealing on the MDL court's docket they challenge.

We reverse in full the exclusion of Plaintiffs' general-causation medical experts and reverse in part the exclusion of their engineering expert. We reverse the grant of summary judgment in favor of 3M. We affirm the discovery order that Plaintiffs challenge. We affirm the MDL court's decision to seal the filings Plaintiffs seek to have unsealed. And we deny Plaintiffs' motion to unseal those same filings on our own docket.

[1]Although George Amador is the captioned Plaintiff-Appellant, this appeal is brought by all Plaintiffs in the MDL to challenge several MDL-wide rulings.

I.

In the mid-1980s, Dr. Scott Augustine invented the Bair Hugger, 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. The device consists of a central heating unit, a hose, and a disposable perforated blanket that is placed over the patient. The central unit, which is often situated on or near the floor when in use, draws in air through a filter, warms that air (usually to a temperature significantly above the operating-room temperature), and blows it through the hose into the perforated blanket. The air exits the blanket through the perforations and keeps the patient warm. Typically, both the patient and the blanket are covered with surgical draping during operations, and the blanket is placed on a part of the body away from the surgical site, so the air does not blow directly onto the surgical site.

Dr. Augustine marketed and sold the Bair Hugger through Augustine Medical, Inc., the company he founded and led as CEO until 2004. Around that time, Dr. Augustine was forced to leave Augustine Medical while under investigation for Medicare fraud. Augustine Medical then reorganized, and the division of the company that retained the Bair Hugger product line changed its name to Arizant Healthcare. In 2010, 3M acquired Arizant Healthcare and the Bair Hugger product line. Arizant Healthcare was dissolved in December 2014.

After leaving Augustine Medical, Dr. Augustine developed the HotDog, a patient-warming device that transfers heat conductively to the patient by direct contact with the patient's skin rather than by forced hot air. He then began a campaign to discredit his old invention and promote his new one. These efforts bore fruit. In March 2013, a plaintiff sued 3M and Arizant Healthcare in Texas state court, claiming that he contracted a PJI due to the Bair Hugger's use in his hip-replacement surgery. Dr. Augustine worked with the law firm representing that plaintiff to prepare a "litigation guide" and solicitation letter for the purpose of fomenting more litigation against 3M. By December 2015, more than sixty materially similar cases against 3M had been filed in or removed to federal district

courts around the country. At that time, the Judicial Panel on Multidistrict Litigation ordered these cases centralized in the District of Minnesota for consolidated pretrial proceedings. *See* 28 U.S.C. § 1407(a). Nearly 6,000 lawsuits have since been filed as part of the MDL.

In these cases, Plaintiffs allege that they suffered PJIs from the use of the Bair Hugger during their orthopedic-implant surgeries. PJIs are frequently caused by the introduction of microbes into the surgical site during surgery. Bacterial contamination is a particularly significant threat in orthopedic-implant surgeries because a PJI can be caused by very few microbes, possibly even a single bacterium. For this reason, it is standard for such surgeries to take place in "ultra-clean ventilation" operating rooms, where air is blown into the operating room through high-efficiency particulate air ("HEPA") filtration at a uniform velocity. This HEPA-filtered "laminar" airflow blows over the patient, reducing the likelihood that operating-room airflow will carry ambient bacteria from nonsterile areas of the operating room into the surgical site.

Plaintiffs advance two theories for how the Bair Hugger caused their PJIs during their orthopedic-implant surgeries. According to the "airflow disruption" theory, waste heat from the Bair Hugger creates convection currents that carry ambient bacteria from nonsterile areas of the operating room to the surgical site despite the laminar airflow, resulting in PJIs. According to the "dirty machine" theory, the Bair Hugger is internally contaminated with bacteria, which are blown through the blanket into the operating room, where they become ambient and eventually reach the surgical site, resulting in PJIs.

In the master long-form complaint filed in the MDL, Plaintiffs asserted fourteen state-law claims against 3M, including negligence and strict liability (for failure to warn, defective design, and defective manufacture), among others.

During discovery, Plaintiffs subpoenaed a third party, VitaHEAT Medical, LLC, to produce discovery regarding its "UB3," a conductive patient-warming

device. Plaintiffs alleged that the UB3 was an alternative design to the Bair Hugger, making this discovery ostensibly relevant to their design-defect claims. *See generally* 63A Am. Jur. 2d *Products Liability* § 894 (May 2021 update) ("The existence of an alternative design may be used to establish that a product was unreasonably dangerous due to a design defect, and in some jurisdictions may be required."). VitaHEAT objected on relevancy grounds, arguing that the UB3 was too different from the Bair Hugger to count as an "alternative design" for product-liability purposes. Plaintiffs then filed what they captioned a "motion to overrule" this relevancy objection. The MDL court denied this motion, agreeing that conductive patient-warming devices like the UB3 are too dissimilar from the Bair Hugger to qualify as "alternative designs," meaning that this discovery was not relevant. *Cf. United States v. One Assortment of 93 NFA Regulated Weapons*, 897 F.3d 961, 966 (8th Cir. 2018) ("The Federal Rules of Civil Procedure limit discovery to that which 'is relevant to any party's claim or defense . . . .'" (quoting Fed. R. Civ. P. 26(b)(1))).

The parties jointly agreed to a protective order to limit the disclosure of confidential information that might be contained in filings entered on the MDL docket. Pursuant to this protective order, the parties submitted numerous filings under seal over the course of the litigation. As relevant to this appeal, 3M sought to keep seven such filings under seal over Plaintiffs' objection, asserting that it would suffer competitive harm if any was unsealed. The MDL court agreed and ordered these files kept under seal.

As the litigation progressed, 3M moved to exclude Plaintiffs' general-causation medical experts (Dr. Jonathan M. Samet, an epidemiologist; Dr. William Jarvis, an infectious-disease specialist; and Dr. Michael J. Stonnington, an orthopedic surgeon) as well as Plaintiffs' engineering experts (including Dr. Said Elghobashi and Michael Buck). 3M also filed a motion for summary judgment contingent on the exclusion of Plaintiffs' general-causation medical experts. The MDL court denied in pertinent part the motion to exclude those experts and denied the motion for summary judgment.

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