No. 19-2899

IN THE

United States Court of Appeals for the Eighth Circuit

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

George Amador,

Plaintiff – Appellant,

v.

3M Company; Arizant Healthcare, Inc.,

Defendants – Appellees,

On Appeal from the United States District Court
for the Eastern District of Minnesota
(MDL No. 15-2666 (JNE/DTS), Hon. Joan N. Ericksen)

BRIEF OF AMICI CURIAE THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE 3M PARTIES SEEKING REHEARING EN BANC

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Corporate Disclosure Statement

In accordance with Fed. R. App. P. 26.1, the Amici Curiae further described below state that they are nonprofit organizations with no parent corporations and in which no person or entity owns stock.

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Interest of Amici Curiae[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[2] PLAC seeks to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product safety risk management. PLAC's members, and product manufacturers throughout the nation, have a strong interest in the formulation and application of the standards governing the admission of expert testimony in the federal courts. PLAC has had a leading role in briefing expert-evidence cases,

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[1] None of the counsel representing the parties in this action authored this brief in whole or in part. No party or counsel for any party, and no person other than PLAC, NAM, their members, and counsel contributed money to fund the preparation or submission of this brief.

[2] *See* https://plac.com/PLAC/About_Us/PLAC/About.aspx.

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including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and numerous circuit court cases throughout the country.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million people, contributes roughly $2.35 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of private-sector research and development in the Nation. NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the Nation.

Trial courts' gatekeeper role in evaluating the reliability of proffered expert testimony is vitally important to PLAC and NAM members. If this role is not properly exercised, the fundamental fairness of civil jury trials in complex cases such as this one is compromised. PLAC and NAM's members are involved in defending an increasing number of product-liability lawsuits, in which expert testimony is the rule, not the exception. Because both state and federal trial courts look to the federal appellate courts for guidance on these complex issues, this brief is submitted to address the broad public importance of this Court's decision on these issues.

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Introduction and Summary of Argument

The Court should grant rehearing *en banc* and reconsider the panel opinion, particularly the interpretation and application of Federal Rule of Evidence 702. The panel opinion—which broadly paraphrased, but never quoted or applied Rule 702—focused on whether the expert opinions at issue were "so fundamentally unsupported" in their factual basis that they "can offer no assistance to the jury." That language originated in a pre-*Daubert* decision this Court announced in 1988, and owes its existence to a still earlier Fifth Circuit opinion construing Federal Rules of Evidence 703 and 403. Even assuming the "no assistance to the jury" rubric is capable of being reconciled with the *Daubert* Court's watershed interpretation of Rule 702 in 1993, there is no basis for it to continue to apply under the current version of Rule 702, twice amended since 1988. Excluding expert testimony "only if it is so fundamentally unsupported that it cannot help the factfinder" conflates two elements of Rule 702– reliability (whether the evidence is fundamentally supported) and relevancy (whether the evidence is helpful) – and allows exclusion if the expert testimony fails ***both*** tests. Allowing expert evidence to pass judicial gatekeeping unless it is devoid of any helpfulness is not the test for admissibility. This Court should take the opportunity to clarify the governing standard.

Argument

1. The panel erred in assessing the admissibility of expert testimony based on whether the opinion in question was "so fundamentally unsupported that it can offer no assistance to the jury."

A. The so-fundamentally-unsupported concept originated in the context of Rule 703, and wasn't intended to apply to the admissibility of expert testimony under Rule 702.

As discussed in 3M's Petition for Rehearing *En Banc*, the origin story for this Circuit's "so-fundamentally-unsupported" concept starts with *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)), where the court stated that, "if an expert opinion is so fundamentally unsupported that it can offer no assistance to the jury, then the testimony should not be admitted." *Id.* Applying that test, the court affirmed the admission of expert testimony over the defendant's objection that the evidence was speculative. *See id.*

From that inception point, the so-fundamentally-unsupported concept evolved to a test that excluded expert testimony "***only*** if it is so fundamentally unsupported that it cannot help the factfinder." *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989) (emphasis added). That language was copied with only minor deviations in case after case, both before and after the Supreme Court's trilogy of expert-evidence decisions in *Daubert*, *Joiner*, and *Kumho Tire*, and even after the amendment of Rule 702 in 2000. Most recently, this included the panel decision in this case, stating: "a district court may exclude an expert's opinion if it is 'so fundamentally unsupported' by its

factual basis 'that it can offer no assistance to the jury.'" *Amador v. 3M Co.*, No. 19-2899, slip op. at 9 (8th Cir. Aug. 16, 2021).

But the *Loudermill* court didn't conceive the so-fundamentally-unsupported concept from whole cloth. Rather, it cited the Fifth Circuit's decision in *Viterbo v. Dow Chemical Co.*, 826 F.2d at 422, where the court examined the admissibility of expert testimony under Rules 703 and 403—not Rule 702—and held that "[i]f an opinion is fundamentally unsupported, then it offers no expert assistance to the jury. Furthermore, its lack of reliable support may render it more prejudicial than probative, making it inadmissible under FED. R. EVID. 403." *Id.* (citing *Barrel of Fun, Inc. v. State Farm Fire & Cas. Co.*, 739 F.2d 1028, 1035 (5th Cir. 1984)). Rule 702 did not figure into the Fifth Circuit's effort to evaluate the reliability of expert testimony in the pre-*Daubert* era.

In fact, before the Supreme Court announced its opinion in *Daubert*, federal circuit court decisions were split on the extent to which the Federal Rules of Evidence empowered district court judges to evaluate the reliability of expert testimony. The Fifth Circuit—the source of the *Viterbo* decision—at one time perceived Rule 703 as the basis for district courts to "examine the reliability of th[e] sources" on which expert witnesses base their testimony. *Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983). Courts in other circuits also found Rule 703 to be the basis for a trial court's authority to police the reliability of expert testimony. *See, e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1244 (E.D.N.Y. 1985) (Weinstein, J.);

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1327-28 (E.D. Pa. 1980).

In the 33 years since the so-fundamentally-unsupported concept was articulated in *Loudermill*, its parentage has never been seriously scrutinized. Yet, reversing the trial court's decision in this case, the panel opinion incorrectly assumed that this concept was, in essence, a part of the Rule 702 inquiry, without express consideration of the actual text of Rule 702 or whether the so-fundamentally-unsupported concept has any relationship to that text. As discussed below, the panel's failure to apply the standard articulated in the text of Rule 702 was error, and should be corrected.

B. The so-fundamentally-unsupported concept is textually inconsistent with and unsupported by Rule 702.

Daubert applied a textual analysis of that original version of Rule 702, as it existed at the time *Loudermill* was decided. Starting with the opening clause, the Court highlighted the phrase "scientific … knowledge." The adjective "scientific," the Court observed, "implies a grounding in the methods and procedures of science." *Daubert*, 509 U.S. at 590. The word "knowledge" connotes "more than subjective belief or unsupported speculation," and "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.'" *Id.* Observing that "scientific knowledge" requires that expert testimony "must be supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known," the Court concluded that this part of Rule 702 "establishes a standard of evidentiary reliability."

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Id. Importantly, in holding that Rule 702 codifies a reliability standard, the *Daubert* Court implicitly rejected the *Viterbo* court's conclusion that Rule 703 was the source of the reliability test.

The *Daubert* Court next considered the phrase "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 591. This "helpfulness" requirement "goes primarily to relevance," as expert testimony that doesn't relate to any issue in the case is irrelevant and, therefore, non-helpful. *Id.* The Court referred to this helpfulness prong of Rule 702 as requiring that expert testimony "fit" the facts of the case. *Id.*

Here, the panel decision excluding expert testimony "only if it is so fundamentally unsupported that it cannot help the factfinder" improperly conflates two elements of the Rule 702 analysis – reliability (whether the evidence is fundamentally supported) and relevancy (whether the evidence is helpful) – and allows exclusion only if the expert testimony fails ***both*** tests. *Daubert* and its progeny allow expert testimony to be excluded if it fails ***either*** test. The *Daubert* Court explained, for example, that *reliable* expert testimony about the phases of the moon could still be excluded as unhelpful if offered to show that "an individual was unusually likely to have behaved irrationally on [the] night" of a full moon. *Id.* at 591. In *Joiner*, the Court referred to "the testimony of a phrenologist who would purport to prove a defendant's future dangerousness based on the contours of the defendant's skull" as an example of expert testimony that was fundamentally unreliable "junk

science." 522 U.S. at 153 n.6. Under the panel decision, even unreliable expert testimony might be admissible unless it was also completely irrelevant.

C. The so-fundamentally-unsupported concept is textually inconsistent with Rule 702, as amended in 2000.

In 2000, Rule 702 was substantially amended to add three subparts identifying specific findings that a trial court had to make before expert testimony could be admitted, with the criteria framed using the conjunctive word "and." *See Graham v. CIOX Health, LLC*, 952 F.3d 972, 975 (8th Cir. 2020).

The subpart requiring expert testimony must be "based upon sufficient facts or data" "calls for a quantitative rather than qualitative analysis." FED. R. EVID. 702 (advisory committee notes 2000 amendment); *see* 29 CHARLES WRIGHT & VICTOR GOLD, FEDERAL PRACTICE & PROCEDURE § 6266 (Supp. 2011). The word "data" encompasses the reliable opinions of other experts, and the words "facts or data" are broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence.

Rule 702's next subpart requires that "the testimony is the product of reliable principles and methods." This mirrors *Daubert*'s focus on the reliability of the expert's "principles and methodology . . . ." 509 U.S. at 595.

The final subpart requires that "the expert has reliably applied the principles and methods to the facts of the case." This reflects *Daubert*'s overarching focus on reliability; its specific concern about "whether expert testimony proffered in the case

is sufficiently tied to the facts of the case," *id.* at 591; and *Joiner*'s holding that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert," so a "court may conclude that there is simply too great an analytical gap between the data and the opinion proffered," 522 U.S. at 146.

Some courts opined that the 2000 amendment codified aspects of *Daubert*. *United States v. Mitchell*, 365 F.3d 215, 234 (3d Cir. 2004); *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). Others held that the amendment superseded *Daubert*, but that *Daubert* and its progeny remain *persuasive* authority. *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005); *Huber v. JLG Indus., Inc.*, 344 F. Supp. 2d 769, 773 (D. Mass. 2003).[3] Many courts merely acknowledged the rule, and then analyzed the testimony without any effort to apply the rule's precepts. This error is visible in the panel's decision here. Basic canons of construction require that courts give effect to

[3] Scholarly commentators have reached a similar range of conclusions about the intent of the 2000 amendment. *See* 5 CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, FEDERAL EVIDENCE § 11:8 (3d ed. 2007 & Supp. 2011) (2000 amendment to Rule 702 was a "blockbuster amendment" and "perhaps the most significant of all of the amendments to the Rules adopted to date"); 3 DAVID FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE § 22:15 (2010) (Rule 702(1) embodies a "fit" analysis "as discussed in *Daubert* and *Joiner*"); *see also* ("In 2000, *Kumho*'s holding was codified by amending Rule 702 to its current form"); William Childs, *The Overlapping Magisteria of Law and Science: When Litigation and Science Collide*, 85 NEB. L. REV. 643, 680 n.23 (2007) (acknowledging the theory that the amended Rule 702 superseded *Daubert*); David Owen, *A Decade of Daubert*, 80 DENV. U. L. REV. 345, 362 (2002) ("the amendment (including the Committee Note) to [Rule] 702 doesn't provide a conclusive roadmap for each specific aspect of expert testimony, but it does provide helpful guidance").

the full text of the amended rule. In construing such amendments, courts must presume that the changes were intended to have a "real and substantial effect." *Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129, 145 (2003). The unsupported assumption that the amendment did nothing more than ratify the pre-existing case law is contrary to this canon. Further, courts should presume that the amended and original parts were designed to function as an integrated whole, giving effect to both. *See Markham v. Cabell*, 326 U.S. 404, 411 (1945).

Conclusion

Rule 702 places the burden on the proponent of expert evidence to prove that the expert testimony meets each of the separately identified criteria in the rule before the testimony could be admitted.[4] The so-fundamentally-unsupported concept shifts the burden to 3M to show both that the evidence was fundamentally unsupported (unreliable) and unable to help the jury (irrelevant), an approach unsupported by the text of Rule 702 and incompatible with *Daubert* and its progeny. The Court should clarify the standard. Without such clarification, this Circuit may well become a magnet for the filing of lawsuits based on marginal expert testimony.

Done this 20th day of September, 2021.

[4] Rule 702 is on the cusp of another important amendment that embeds the Rule 104(a) preponderance-of-the-evidence standard within Rule 702 and requires the expert's ultimate opinion to reflect the reliable application of the underlying methodology, further clarifying how far the standard has moved away from the so-fundamentally-unsupported concept conceived over 30 years ago.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 and 32 and 8th Cir. R. 28A because it contains **2,586** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft® Word 2016 in Garamond 14-point font.

3. The electronic version of this brief has been scanned for viruses and has been found to be virus free.

s/ L. Michael Brooks, Jr.
L. Michael Brooks, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the Court's CM/ECF system on September 20, 2021. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ L. Michael Brooks, Jr.
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