

## Product Liability Appeal Won Due to Analytical Gaps in Plaintiff's Expert Witness Opinion



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In a negligence and failure-to-warn case brought against a product distributor, the plaintiff was relying on their expert witness as the sole means to prove that the product at issue came from the defendant. However, the plaintiff's expert witness failed to pass muster under the relevant legal test so they were thrown out. Without their expert, the plaintiff's case failed, so summary judgment for the defendant was affirmed. The U.S. Court of Appeals for the Eighth Circuit used this recent case to reiterate its standard for the logic that must undergird expert witness opinions, and in so doing underscored some important points for products liability defense lawyers.

**An Expert Must Logically Add Up.** Interestingly, the expert here did not fail because of scientific shortcomings or complex *Daubert* briefing. This failure was actually quite straightforward. Among the factors that determine whether an expert opinion satisfies the requirements of Rule 702 is the expert's "ability to rule out other possibilities." The Eighth Circuit explained that an expert need not rule out every possible alternative, but should adequately account for obvious alternative explanations. Otherwise, there may be "too great an analytical gap between the data and the opinion proffered." Here, the plaintiff's expert failed to account for the possibility that the subject product was distributed by another distributor. This was too great an analytical gap for the trial court, and the Eighth Circuit agreed.

**What Makes a Plaintiff's Expert Witness so Damaging and What to Do About It.** The best time to mount an attack on a plaintiff's expert witness is before they get in front of the jury. This is because, as the Eighth Circuit shrewdly acknowledged in this recent case, keeping out an unreliable expert witness "safeguards against the risk that the jury might defer to the expert simply because of the expert's 'expertise in other areas.'" Skilled lawyering in this case knocked out the plaintiff's expert at the summary judgment stage, thus mitigating this risk before the expert got anywhere near a jury. A careful analysis of expert witness opinions lined up against the controlling legal standard will often show logical gaps and deficient qualifications that can be exploited through strategic motions practice.

**Litigating With the Appeal in Mind.** By winning below on an issue that would be reviewed very deferentially by the appellate court, the defense counsel helped to win the appeal before one was even filed. Where there are multiple issues at play in complex litigation, trying to achieve victory on an issue that will survive appeal is next-level litigating that takes careful analysis. In this case the plaintiff tried to address their expert witness problem from another angle, but the Eighth Circuit rebuffed this attempt, cautioning that an appellate record cannot "rescue an expert opinion from inadmissibility by filling its analytical gaps." In other words, the defense counsel sufficiently "appealproofed" the case.

Case reference: *Hirschak v. W.W. Grainger, Inc.*, No. 19-2642 (8th Cir. Nov. 17, 2020).

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