# DEFENDING PLAINTIFF'S EXPERT AGAINST CHALLENGES UNDER INDIANA EVIDENCE RULE 702

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**Practice Areas**: Representing People Injured by Automobile, Motorcycle and Truck Accidents, Defective Products, Dog Bites, Nursing Home Negligence, Toxic Exposure, Traumatic Brain Injuries, Unsafe Premises, Unsafe Workplaces and Wrongful Death; Civil Mediation.

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## I. INITIAL CONTACT WITH THE EXPERT WITNESS

Preparing the plaintiff's expert for an Evidence Rule 702 challenge must begin with first contact. Under T.R. 26(B)(4), the expert's entire file is discoverable by the defendant, including correspondence to and from the expert. Accordingly, it is recommended that initial contact with the expert take place telephonically to ascertain the expert's qualifications, frame the precise issues for expert testimony, and discuss any potential Evid. R. 702 challenges. It is imperative to obtain an up-to-date CV from the expert setting forth his/her educational background, vocational training and experience, publications and presentations, fee schedule, references, and prior experience as an expert witness.

Be specific with your expert concerning the precise issues of his/her expert testimony. Many successful challenges under Evid. R. 702 result when issues outside of the expert's scope of expertise are thrust upon him/her unexpectedly, or when attempts are made to "dove-tail" collateral issues to the primary issue(s) for which the expert was hired. Outline with precision each issue for which you are seeking expert testimony, and confirm with the expert whether each issue falls under the scope of his/her expertise. Inquire as to the number of times the expert has testified (both in depositions and at trial) concerning your issues, and obtain references as to other plaintiff's attorneys who have hired the expert to testify regarding the same or similar issues. Ask the expert what documents or information he/she needs from your file in order to offer an opinion. Most importantly, be candid with your expert about the likelihood of an Evid. R. 702 challenge on a particular issue, and inquire about the number of instances in which the expert has been challenged, both successfully and unsuccessfully, in the past.

Assuming that all of the aforementioned inquiries are answered to your satisfaction,

carefully draft your initial letter to the expert providing the following: (1) the factual information needed about your case and/or client; (2) the necessary medical records, investigative reports, photographs, etc.; (3) the precise issues you wish for the expert to address; and if applicable, (4) the reports of any other experts in the case which your expert should consider in preparing his/her opinions. It is also recommended that the plaintiff's attorney include the entire text of Evid. R. 702 in this letter so that the expert will be very acquainted with the standard for admissibility of his/her opinions. Prepare your letter carefully as though it were to be introduced at trial – because it probably will be.

## II. EXPERT REPORTS

Once the expert has completed his/her investigation and is prepared to give an opinion, it is recommended that the plaintiff's attorney confer with the expert telephonically or in person about the opinion before the preparation of a written report. The reasons for this are twofold: First, and quite simply, you may not like the expert's opinion and decide not to use him/her at trial. This is wholly your prerogative under Ind. Trial Rule 26(B)(4)(b), which provides that:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(B) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

In Reeves v. Boyd & Sons, Inc., 654 N.E.2d 864 (Ind. Ct. App. 1995), Boyd filed a witness list that originally included Allan McDonald, Ph.D. Reeves served a notice of deposition and subpoena duces tecum regarding McDonald. Later, Boyd removed McDonald from its witness list and moved to quash the deposition and subpoena. The trial court granted the motion. The Court of Appeals affirmed the trial court's decision, citing to a federal decision from the Northern

District of Illinois which held:

> Although plaintiff may have originally designed the witness as a testifying expert, plaintiff has the prerogative of changing his mind. Since plaintiff changed his mind before any expert testimony was given in this case, the witness never actually acted as a testifying expert witness. The court cannot find, then, that the shift in designation affects the witness's current status as a non-testifying expert witness and denies him the protection afforded such a witness.
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> Thus, because the individual in question was "a non-testifying expert, facts or opinions held by him may only be discovered if defendant shows exceptional circumstances."

Reeves, 654 N.E.2d at 875 (quoting Ross v. Burlington Northern R.R. Co., 136 F.R.D. 638, 639 (N.D. Ill. 1991)). See also: R. R. Donnelley & Sons Co. v. N. Tex. Steel Co., 752 N.E.2d 112, 131-32 (Ind. Ct. App. 2001): "the policy behind the rule encourages parties to consult experts, discard experts should they choose to, and place those discarded experts beyond the reach of an opposing party . . . [the rule] was largely developed around the doctrine of unfairness--designed to prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation."

Second, unlike federal court[1], there is no requirement under the Indiana Rules of Trial Procedure that an expert witness must prepare a written report. However, if a written report is prepared, that report must be disclosed under T.R. 26(B)(4), unless the report is prepared by a consulting expert who is not expected to be called to testify at trial. See: Ind. Trial Rule 26(B)(4)(b); R. R. Donnelley & Sons, 752 N.E.2d at 131-32.

Thus, the question arises, "Should a plaintiff's attorney request a written report from an

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[1] Fed. R. Civ. Pro. 26(a)(2)

expert?" The lawyer-like answer is (of course), "it depends." On one hand, written reports can be very useful in negotiating settlements before trial, especially if those reports substantiate the nature and extent of the plaintiff's damages. On the other hand, an expert's written report provides an additional item for cross-examination or impeachment, it helps opposing counsel better prepare for the expert's deposition, and it may have the effect of "boxing in" your expert's opinion. As a general rule, your author recommends obtaining written reports as they pertain to purely damage issues (i.e., the nature and extent of plaintiff's injuries, permanent partial impairment (PPI) rating or economic losses), and foregoing a written report on issues involving liability and/or causation.

Regardless of whether a written report is prepared, the expert must satisfy the provisions of Evid. R. 702 in order to offer his/her opinion. A written report should therefore incorporate the same foundational requirements as the expert's deposition or trial testimony. Thus, the guidelines which follow in the next section are equally applicable to either a written report or the testimony of plaintiff's expert.

## III. THE FOUNDATIONAL REQUIREMENTS FOR EXPERT TESTIMONY

Indiana Evidence Rule 702 provides as follows:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Under this rule, a witness may be qualified as an expert by virtue of "knowledge, skill,

experience, training, or education." Kubsch v. State, 784 N.E.2d 905, 921 (Ind. 2003). Only one characteristic is necessary to qualify an individual as an expert. Creasy v. Rusk, 730 N.E.2d 659, 669 (Ind. 2000). As such, a witness may qualify as an expert on the basis of practical experience alone. Id.

Since an expert may be qualified under Evid. R. 702(a) only by virtue of his/her "knowledge, skill, experience, training or education," the expert must first establish his/her qualifications to offer an expert opinion. Do not simply admit the expert's Curriculum Vitae and move on to his/her opinions. Take the time to thoroughly develop your expert's credentials, including his/her education, background, training and experience. Elicit specific, detailed information as to his/her qualifications to offer an expert opinion on the issue(s) in question. Establish the instances in which your expert has previously qualified and testified as an expert witness, and how often he/she has testified as to the issues involved in your case. Err on the side of too much information. Think of a challenge under Evid. R. 702 like an assault on a medieval castle – the higher the castle wall, the more difficult the assault will be. As the plaintiff's attorney, it is your job to build that castle wall, so lay your foundation brick, by brick, by brick to ensure that your wall is high enough[2].

The next foundational requirement is found in Evid. R. 702(b), which provides that "Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." Note that the language of 702(b)

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[2] Hang out our banners on the outward walls;
The cry is still, "They come!" our castle's strength
Will laugh a siege to scorn.
William Shakespeare, Macbeth, Act V, Scene 5

is limited to *scientific* testimony, whereas 702(a) states that expert testimony may embody "scientific, technical, or other specialized knowledge." Does this mean that the provisions of Evid. R. 702(b) apply only if the expert testimony is scientific in nature? Consider Cansler v. Mills, 765 N.E.2d 698 (Ind. Ct. App. 2002), in which the Court of Appeals addressed this issue in a products liability claim involving the failure of an airbag to deploy, where the plaintiff offered the affidavit of an automobile mechanic in response to the defendants' motion for summary judgment. The trial court refused to consider the mechanic's affidavit, finding that he was not qualified to testify as an expert under Evid. R. 702, and entered summary judgment on behalf of the defendants. The Court of Appeals reversed, holding as follows:

> In his deposition, Brake admitted that he had never consulted in a case where an air bag had been defective, attended classes relating to Corvettes, or done any work designing or testing air bags. Brake also admitted that he was not aware of the underlying scientific principles that relate to air bag deployment. However, Brake testified that he had been a mechanic since approximately 1970 and that he has been in the business of restoring salvaged vehicles for approximately 18 years. In 1992, Brake started his own car sales and automobile repair and salvage business, Bruce's Repair, Body and Wrecker Service. Brake testified that through his employment he had examined numerous wrecked automobiles with deployed air bags. In particular, Brake worked on at least 20 to 25 wrecked Corvettes over the last ten years. Brake noted that, like the other wrecked automobiles he had examined, the air bags in the Corvettes were deployed when the cars had front-end damage extensive enough to cause damage to the cars' frame.
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> Three to four days after Cansler's accident, Brake examined Cansler's Corvette. Brake asserted that the Corvette had damage to the front frame section. Brake then gave his opinion that based on his observations of other vehicles that had been in accidents severe enough to cause front frame damage, the air bag in Cansler's Corvette should have deployed because the Corvette hit hard enough to cause front frame damage. In its summary judgment motion, General Motors argued that Brake was not qualified to give an expert opinion on air bag deployment and that his opinion had no scientific basis or foundation. The trial court agreed with General Motors and excluded Brake's testimony.

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However, "qualification under Rule 702 (and hence designation as an expert) is only required if the witness's opinion is based on information received from others pursuant to [Indiana Evidence] Rule 703 or on a hypothetical question." 13 ROBERT LOWELL MILLER, JR., INDIANA EVIDENCE § 701.105 at 321 (2d 1995). The testimony of an observer, skilled in an art or possessing knowledge beyond the ken of the average juror may be nothing more than a report of what the witness observed, and therefore, admissible as lay testimony. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). ***This type of evidence is not a matter of "scientific principles" governed by Indiana Evidence Rule 702(b); rather, it is a matter of the observations of persons with specialized knowledge.*** See: Jervis v. State, 679 N.E.2d 875, 881 (Ind. 1997) (Emphasis added).

Such witnesses possessing specialized knowledge are often called skilled witnesses or skilled lay observers. Warren v. State, 725 N.E.2d 828, 831 (Ind. 2000); Mariscal v. State, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997), trans. denied. A "skilled witness" is a person with "a degree of knowledge short of that sufficient to be declared an expert under Ind. Evid. Rule 702, but somewhat beyond that possessed by the ordinary jurors." Mariscal, 687 N.E.2d at 380; MILLER, *supra*, § 701.105 at 318. Skilled witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge. See: MILLER, *supra*, §701.105 at 319-20. In order to be admissible under Evidence Rule 701, opinion testimony of a skilled witness or lay observer must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Mariscal, 687 N.E.2d at 380 (quoting Ind. Evidence Rule 701).

Brake's testimony consisted of a report of his observations from his examination of Cansler's Corvette as well as his opinion based on those observations. Brake reported that he examined Cansler's Corvette and found that it had damage to the front frame section. Brake also testified that over the course of his career restoring salvaged vehicles, when he observed wrecked automobiles equipped with air bags that had suffered front-end frame damage during an accident, the air bag in the vehicles had deployed. Brake's testimony concerning the location and the extent of the damage to Cansler's Corvette and the condition of other automobiles that he examined during the course of his career was merely a report of his personal observations.

Even though Brake's knowledge of air bags did not rise to a sufficient level to qualify him as an expert in the field, Brake could testify to his observations. Brake's years of experience in automobile salvage enabled him identify that

> Cansler's Corvette suffered front frame damage as a result of the accident. While Brake may not have been qualified to render an opinion on the deployment of the Corvette's air bag, he could testify about observations from his years of experience with wrecked automobiles and from his examination of Cansler's Corvette. Therefore, we find that the trial court abused its discretion when it excluded all of Brake's testimony.

Cansler, 765 N.E.2d at 702-04. See also: Farrell v. Littell, 790 N.E.2d 612, 617 (Ind. Ct. App. 2003).

Thus, in the case of an expert whose opinions are based upon "scientific principles," it must be established that "the scientific principles upon which the expert testimony rests are reliable." When determining whether scientific evidence is admissible under 702(b), courts *may* consider the factors discussed in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). As the Indiana Supreme Court has observed:

> The Indiana Evidence Rules differ from the Federal rules in that, "expert scientific testimony is admissible only if the court is satisfied that the *scientific principles upon which the expert testimony rests are reliable*." Ind. Evidence Rule 702(b) (emphasis added). "Federal case law interpreting the Federal Rules of Evidence is not binding upon the determination of state evidentiary law." See McGrew v. State, 682 N.E.2d 1289, 1290 (Ind. 1997) (citing Steward v. State, 652 N.E.2d 490, 498 (Ind. 1995)). "The concerns driving Daubert coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved." Id. ***When analyzing Indiana Evidence Rule 702(b), we find Daubert helpful, but not controlling***. Id. (Emphasis added).

Malinski v. State, 794 N.E.2d 1071, 1084 (Ind. 2003). This last statement by our Supreme Court is so significant to challenges under Evid. R. 702 that it bears repeating: "***When analyzing Indiana Evidence Rule 702(b), we find Daubert helpful, but not controlling***." Invariably, challenges brought by defendants under Evid. R. 702 are grounded in Daubert and its federal

progeny, which are legion and nefarious; but "federal case law interpreting the Federal Rules of Evidence is not binding upon the determination of state evidentiary law." McGrew v. State, 682 N.E.2d 1289, 1290 (Ind. 1997) (citing Steward v. State, 652 N.E.2d 490, 498 (Ind. 1995)). It is therefore the paramount role of the plaintiff's attorney in an Evid. R. 702 challenge to ensure that your case is not decided under the Daubert-esque, federal standard, but rather on the standard established by the Indiana Supreme Court and Court of Appeals. That standard will be discussed in further detail *infra*, but first a few words about Daubert.

In Daubert, the United States Supreme Court held that for scientific knowledge to be admissible under Federal Evidence Rule 702, the trial court judge must determine that the evidence is based on, among other things, scientifically valid methodology. Id. at 592-93. To assist trial courts in making this determination, the Court outlined a non-exclusive list of factors that may be considered: whether the theory or technique can be and has been tested, whether the theory has been subjected to peer review and publication, whether there is a known or potential error rate, and whether the theory has been generally accepted within the relevant field of study. Id. at 593-94. Subsequently, in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999), the Supreme Court extended the Daubert principles to all types of expert testimony.

Under Indiana law interpreting Evid. R. 702, reliability may be established by judicial notice or sufficient foundation to convince the trial court that the relevant scientific principles are reliable. Malinski, 794 N.E.2d at 1084. "In determining reliability . . . there is no specific 'test' or set of 'prongs' which must be considered in order to satisfy Indiana Evidence Rule 702(b)." Carter v. State, 766 N.E.2d 377, 380 (Ind. 2002). The trial court's determination regarding the

admissibility of expert testimony under Ind. Evidence Rule 702 is a matter within its broad discretion, and will be reversed only for abuse of that discretion. Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 459 (Ind. 2001).

As a practical matter, the reliability of the expert's opinion under Evid. R. 702(b) can be established by reference to peer review articles, learned treatises or authoritative texts; by citation to standards of the industry or profession; by demonstrating that the opinions or theories have been subjected to testing; or by showing that the principles forming the expert's opinion are well-accepted within the scientific community[3]. Whenever possible, have the expert ground his/her opinion at the most basic scientific level, e.g., math, physics, chemistry, anatomy, physiology, biology, etc. This provides an analytical framework which is easier for courts and juries to understand, and it enables courts and juries to better draw upon their own life experiences when deciding respectively whether to allow, or what weight to give, your expert's testimony. The

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[3] "Acceptance within the scientific community" is the so-called "Frye test," which was the federal and state standard for the reliability of expert testimony prior to Daubert. However, both the United States Supreme Court and the Indiana Supreme Court have noted that Daubert did not overrule Frye as a means by which reliability could be established. Rather, the United States Supreme Court found that Frye required "too much" foundation, not "too little," concluding that the new Federal Rules of Evidence did not intend the "rigid 'general acceptance' requirement" of the Frye test to be an "absolute prerequisite to admissibility." Daubert, 509 U.S. at 588. In citing the "liberal thrust" of opinion evidence under the Federal Rules of Evidence and the "general approach of relaxing the traditional barriers to 'opinion' testimony," the Court held that Frye would no longer be the "exclusive test for admitting expert scientific testimony." 509 U.S. at 588-89. However, the Court noted that:

General acceptance can yet have a bearing on the inquiry. A "reliability assessment does not require, *although it does permit*, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." Widespread acceptance can be an important factor in ruling particular evidence admissible and "a known technique that has been able to attract only minimal support within the community" may properly be viewed with skepticism. Id. at 594. See also: McGrew v. State, 682 N.E.2d at 1291, n.4.

case of Fulton County Commissioners v. Miller, 788 N.E.2d 1284 (Ind. Ct. App. 2003), provides a good illustration in this regard.

If your expert's testimony is not based upon scientific principles, and Evid. R. 702(b) does not strictly apply, you still must establish that he/she is a "skilled witness." As noted above, a "skilled witness" is a person with "a degree of knowledge short of that sufficient to be declared an expert under Ind. Evid. Rule 702, but somewhat beyond that possessed by the ordinary jurors." Cansler, 765 N.E.2d at 702-04. Skilled witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge. Id. In order to be admissible under Evidence Rule 701, opinion testimony of a skilled witness or lay observer must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Id.

The same care and detail used when establishing an expert's qualifications under Evid. R. 702(a) and scientific reliability under Evid. R. 702(b) should be employed when qualifying your skilled witness under Evid. R. 701. Both rules require a foundation as to the background, education, training and experience of the witness. But under Rule 701, your foundational focus must be upon the observations or perceptions of the witness vis-a-vis his/her unique knowledge or training, which in turn enables the skilled witness to testify as to opinions or inferences based upon the facts within his/her personal knowledge. See, e.g., Burge v. Teter, 808 N.E.2d 124 (Ind. Ct. App. 2004), wherein an investigating officer did not qualify as an expert witness under Rule 702 because he was not an accident reconstructionist. However, the officer testified that he had investigated 400-500 collisions, and was trained to investigate an accident scene and to formulate

a primary cause of the accident. On the basis of this testimony, the trial court found, and the Court of Appeals affirmed, that the officer was qualified to testify as to the cause of the collision under Evidence Rule 701.

## IV. THE DEPOSITION OF PLAINTIFF'S EXPERT

Prior to a challenge under Evid. R. 702, the defendant will invariably wish to depose your expert. When this occurs, it is imperative that the plaintiff's attorney meet with the expert, face to face, for a pre-deposition conference to help prepare the expert. Whenever practical, try to schedule this conference a few days in advance of the deposition date. Although it is possible to have an effective conference an hour before the deposition begins, this rarely occurs. Do not underestimate the importance of this pre-deposition conference; if care is taken to familiarize your expert with the foundational requirements for his/her testimony as outlined above, this conference can make a critical difference in your likelihood of success.

Do not be an idle observer at your expert's discovery deposition. When defending against a challenge under Evid. R. 702, a deposition is to an affidavit as a picture is to words. Even though it may be a discovery deposition, treat it in every respect as though it were an evidentiary deposition. The plaintiff's attorney should conduct a complete direct examination of the expert witness after defense counsel has completed his/her cross examination. The substance of your direct examination should be extensively covered with the expert at the pre-deposition conference. By conducting a comprehensive direct examination at the conclusion of the defendant's cross examination, you can address any vulnerabilities which arose during cross, and more importantly, you can build a solid record with which to oppose a subsequent motion to disqualify your expert under Evid. R. 702.

## V. RESPONDING TO A MOTION TO EXCLUDE PLAINTIFF'S EXPERT

When responding to a motion to exclude plaintiff's expert under Evid. R. 702, many of the cases upon which you should rely have been addressed *supra*, with one critical exception: Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453 (Ind. 2001). This is *the* definitive statement by the Indiana Supreme Court on the standard for expert testimony under Evid. R. 702, and it should be the cornerstone of your response.

Milan Manuilov was a 34-year old circus high-wire performer who was injured in 1988 while shopping at the defendant's retail store. At trial, the plaintiff called two medical experts. Jeffrey Quillen, M.D., a physician with the emergency department at Reid Memorial Hospital in Richmond, Indiana, initially examined and treated the plaintiff when he was brought to the emergency room by ambulance immediately after his fall. Dr. Quillen testified that he diagnosed the plaintiff's injury as "post-concussion dizziness," that the plaintiff "has symptoms related to post-concussive syndrome," "that he suffers from post-concussive syndrome," and that the reason for the plaintiff's persistent symptoms "stems from the original fall and injury to his head for which I saw him for the first time." Id. at 458.

Psychiatrist Martin Blinder, M.D., examined the plaintiff in 1991 and 1995. After describing his medical and specialty education and training, experience, teaching, research, and writing, Dr. Blinder provided an extensive explanation of post-concussion syndrome and then detailed his psychiatric examination and assessment of the plaintiff. He determined that the plaintiff suffers from post-concussion syndrome, which is "causally related" to his fall on January 27, 1988. Asked whether brain damage associated with post-concussion syndrome exists as a result of the plaintiff's fall, Dr. Blinder answered:

> I cannot prove the extent to which [the plaintiff] currently suffers brain damage. This reflects less in my inadequacy than the state of the field at this time at the end of the 20th century. Secondly, though I think there are clinical indices for concussion, which is listed under physical injuries, there's no way I can tell you how much of all the symptoms are attributable to the concussion, as opposed to psychological factors. But there is an amalgam here of physical and psychological and I can't draw a bright line between them. They're interwoven and . . . I cannot do that. So I cannot apportion between the physical and the psychological. Finally, though, I know a thing or two about the affects [sic] of head injury on patients in terms of their ability to function mentally, physically, psychologically, emotionally, sexually. . . . There's no doubt that I would defer to somebody who had even greater expertise than I do. . . . I do not have a monopoly on truth when it comes to assessing brain damage. With those qualifications, it is my opinion, to a reasonable degree of medical probability, based on the available evidence for all of its limitations, that this man took a hell of a hit to the head. That this hit to the head has disabled him for reasons that are combined, both physical and psychological factors. Uh, that there is some room for improvement down the road, uh, but that he will have a substantial disability, and that disability impacts upon his personal life and upon his capacity to return to his previous profession.
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> Dr. Blinder also stated that, "this amalgam of psychiatric and post-concussive syndrome symptoms would nonetheless, to a reasonably medical probability, allow [the plaintiff] to safely negotiate one end of the high-wire to the other, anywhere from ninety-six to ninety-seven percent of the time." Id. at 458-59.

The defendant argued that the admission of opinions by Dr. Quillen and Dr. Blinder that the plaintiff's fall caused post-concussion syndrome that disabled him from returning to his work violated Indiana Evidence Rule 702. In particular, the defendant claimed that Dr. Quillen's causation testimony was not scientifically reliable, contrary to Rule 702(b), because the doctor last examined the plaintiff almost ten years before the trial. The defendant further argued that the testimony of both Dr. Quillen and Dr. Blinder regarding post-concussion syndrome did not assist the jury, contrary to Rule 702(a), because "proof of a syndrome does not mean that the symptom etiology is known; instead it merely means that the subject has symptoms which fit a recognized pattern of symptoms in subjects with a history of head injury." In addition, the defendant

contended that Dr. Blinder's causation opinions were scientifically insufficient under Rule 702(b) because as a psychiatrist, he was not qualified to diagnose subtle brain damage; because possible organic causes were not within his area of expertise; and because he did not rule out physical causes. Also asserting that Dr. Blinder was not qualified to render a vocation opinion, the defendant further claimed that it was error to admit his testimony concerning the percentage of times the plaintiff would be able to safely cross the high-wire and his opinion that the plaintiff suffered an impact upon his capacity to return to his work as a high-wire circus performer. Id. at 459.

The Supreme Court noted that the defendant's objections to the physicians' testimony that the plaintiff suffers from post-concussion syndrome were extensively presented both at trial and before trial. The defendant's pre-trial motion in limine sought to exclude all evidence that the plaintiff was diagnosed as suffering from post-concussion syndrome. At the hearing of this motion, the parties submitted extensive briefing and materials, including Dr. Blinder's deposition and testimony of Dr. Quillen and Dr. Blinder during the inconclusive first trial, in which both physicians explained the basis for their diagnosis and were zealously cross-examined by the defense. Notwithstanding the defendant's vigorous challenge to the basis and accuracy of the physicians' diagnosis, the trial court denied the motion in limine. Id. The jury ultimately returned a verdict in favor of the plaintiff in the amount of $1,400,000.00, and the defendant appealed.

In a landmark decision, the Indiana Supreme Court accepted transfer in Manuilov and explained the purpose of Evid. R. 702 and the role of the trial court in deciding whether to permit expert testimony:

In adopting Evidence Rule 702, this Court did not intend to interpose an unnecessarily burdensome procedure or methodology for trial courts. By requiring trial courts to be satisfied that expert opinions will assist the fact-finder and that the underlying scientific principles are reliable, Rule 702 guides the admission of expert scientific testimony. ***Although it authorizes the exclusion of purported scientific evidence when the trial court finds that it is based on unreliable principles, the adoption of Rule 702 reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence.*** Before Rule 702(b), Indiana courts applied the Frye test which determined the admissibility of novel scientific evidence based upon its general acceptance in the scientific community (citations omitted). Rule 702(b) is broader than the Frye test in that it permits trial courts to consider factors other than general acceptance and thus may permit expert testimony in new, innovative areas even though general acceptance may not yet have been achieved but which are otherwise found to be based on reliable scientific principles. This is analogous to the liberalizing of the Frye rule achieved by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (citations omitted). Given that the thrust of our Rule 702(b) was to liberalize admissibility of reliable scientific evidence, "it is most improbable that a generally accepted scientific principle would be too unreliable to be admitted into evidence" (citations omitted).

***If applied to separately evaluate every subsidiary point made during the testimony of a qualified expert regarding matters based on reliable science, Rule 702(b) can become excessively burdensome to the fair and efficient administration of justice. It directs the trial court to consider the underlying reliability of the general principles involved in the subject matter of the testimony, but it does not require the trial court to re-evaluate and micromanage each subsidiary element of an*** **expert's testimony** ***within the subject. Once the trial court is satisfied that the*** **expert's testimony** ***will assist the trier of fact and that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact.*** (Citations omitted, emphasis added).

Id. at 460-61 (Emphasis added). See also: Suell v. Dewees, 780 N.E.2d 870, 876 (Ind. Ct. App. 2002).

## VI. CONCLUSION

As the Manuilov decision makes clear, once the trial court determines that expert testimony will assist the trier of fact and that the testimony is based upon reliable scientific principles, the testimony should be admitted, and its weight is left to the jury. It is therefore incumbent upon the plaintiff's attorney to lay the appropriate foundation under Evidence Rules 702(a) and 702(b) so as to ensure the admissibility of the expert's testimony. Manuilov emphasizes that Evid. R. 702 was intended to liberalize, not restrict, the admission of reliable expert testimony, and thus the trial court is not required to separately evaluate or "micromanage" each subsidiary element of the expert's testimony. This is a *significant* departure from post-Daubert federal case law interpreting Federal Evidence Rule 702, and this distinction must be emphasized to the trial court when opposing a challenge to the plaintiff's expert witness under Indiana Evidence Rule 702.

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