

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

(Cavanagh, P.J., and Owens and M.J. Kelly, JJ.)

JEFFREY CULLUM,

Plaintiff-Appellee,

v

FREDERICK LOPATIN, D.O.,

Defendant-Appellant,

and

DEARBORN EAR, NOSE AND THROAT
CLINIC, P.C.,

Defendant.

SC No. 149955

COA No. 313739

LC No. 10-007013-NH

(Wayne County Circuit Court)

**SUPPLEMENTAL BRIEF IN SUPPORT OF FREDERICK L. LOPATIN, D.O.'S
APPLICATION FOR LEAVE TO APPEAL**

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**STATEMENT OF QUESTIONS PRESENTED
(SUPPLEMENTAL QUESTIONS)**

I.

WHETHER THE TRIAL COURT WAS REQUIRED TO CONSIDER ALL OF THE FACTORS OUTLINED IN MCL 600.2955(1) IN LIGHT OF *EDRY v ADELMAN*, 486 MICH 634 (2010)?

Defendant-Appellant Dr. Lopatin says, "No."

Plaintiff-Appellee says, "Yes."

II.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN HOLDING THAT PLAINTIFF'S EXPERT OPINION WAS INADMISSIBLE UNDER MRE 702 BECAUSE IT WAS BASED ON SPECULATION?

Defendant-Appellant Dr. Lopatin says, "No."

Plaintiff-Appellee says, "Yes."

III.

WHETHER THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW?

Defendant-Appellant Dr. Lopatin says the Court of Appeals stated but did not properly apply the correct standard of review.

Plaintiff-Appellee says, "Yes."

STATEMENT OF FACTS

Defendant-Appellant Frederick Lopatin, D.O. (“Defendant” or “Dr. Lopatin”) adopts and incorporates by reference the Statement of Facts set forth in his application for leave to appeal.

INTRODUCTION

Dr. Lopatin seeks leave to appeal from the Court of Appeals’ decision in *Cullum v Lopatin, DO*, Court of Appeals Docket No. 313739, *rel’d* July 10, 2014 (unpublished) (“Slip Opinion”) (**Exhibit A**), in which the Court of Appeals reversed the grant of summary disposition previously entered by the Wayne County Circuit Court. Plaintiff-Appellee Jeffrey Cullum (“Plaintiff”) had alleged that Dr. Lopatin, an otolaryngologist, failed to monitor and over-prescribed corticosteroids (“steroids”) which, according to Plaintiff, caused him to develop avascular necrosis (“AVN”) of the bone in his right hip. In an opinion and order dated November 19, 2012, (**Exhibit B**) the trial court found that Plaintiff could not establish proximate cause of his injuries because Plaintiff’s expert witness failed to establish through reliable scientific evidence the cause and effect relationship between short-course steroid therapy and AVN (**Exhibit B**, p 1). The trial court specifically cited to the fact that Dr. Michael McKee, Plaintiff’s expert, relied only on his own study, which included only 15 patients, and specifically stated that it did not provide “conclusive proof that there is a cause and effect relationship between short-course therapy and osteonecrosis.” (*Id.* at 2-3). Noting that “[n]o other literature or studies were presented to support his [McKee’s] conclusions, the trial court found that Plaintiff’s expert opinion on causation “is speculative and unsupported.” (*Id.*). Given the need for expert testimony on the elements of the action in a medical malpractice action, and the fact that Dr. McKee was

Plaintiff's only proffered expert witness on proximate cause, the trial court then granted summary disposition in favor of Dr. Lopatin and against Plaintiff (**Exhibit B**, pp 3-4).

In its July 10, 2014 per curiam Opinion reversing the trial court, the Court of Appeals determined that the trial court "abused its discretion" when it concluded that Dr. McKee's expert opinion testimony on the issue of causation was inadmissible (**Exhibit A**, p 5). Noting that the trial court had stated that Dr. McKee's causation testimony was "speculative and unsupported," the Court of Appeals looked at the history of the trial court pleadings and found that, "although unclear from its opinion," the trial court "must also have concluded that Dr. McKee's testimony constituted evidence that failed to meet the requirements of reliability set forth in either or both MRE 702 and MCL 600.2955 and, therefore, was inadmissible." (**Exhibit A**, p 6). For this proposition, the Court of Appeals specifically cited this Court's opinion in *Edry v Adelman*, 486 Mich 634, 642 n 7; 686 NW2d 567 (2010) (*Id.* at 6). The Court of Appeals determined that, although the trial court considered Dr. McKee's 2001 study which formed a basis for its decision, the trial court failed to consider Dr. McKee's "own clinical experience with similar cases and his examination of how Plaintiff's symptoms developed." (*Id.* at 7). Thus the trial court "abused its discretion" by "inadequately perform[ing] its gatekeeper role under MRE 702" (*Id.*).

Next, the Court of Appeals found that the trial court "abused its discretion" by failing to consider each factor of MCL 600.2955(1) before finding Dr. McKee's testimony inadmissible (*Id.* at 8).

Finally, the Court of Appeals concluded that the trial court "improperly weighed the relative value of testimonial evidence provided by each party and inappropriately made

credibility determinations in reaching its decision to exclude Dr. McKee's causation testimony." (*Id.* at 8). "Simply put, the trial court was not at liberty to decide which expert or experts to believe." (*Id.* at 9).

At pages 9-11 of its Opinion, the Court of Appeals rejected Defendant's argument on appeal that the trial court's summary disposition decision should be affirmed on the alternative grounds that Plaintiff's evidence failed to create a question of fact on both factual causation and legal causation (*Id.* at 9-11).

On August 21, 2014, Dr. Lopatin filed his timely application for leave to appeal. After Plaintiff filed a response, Dr. Lopatin filed his reply brief, and this Court ordered supplemental briefing through an order dated April 29, 2015 (**Exhibit C**). The Court asked the parties to file supplemental briefs addressing three questions:

Whether the trial court was required to consider all of the factors outlined in MCL 600.2955(1) in light of *Edry v Adelman*, 486 Mich 634 (2010)?

Whether the trial court abused its discretion in holding that Plaintiff's expert opinion was inadmissible under MRE 702 because it was based on speculation?

Whether the Court of Appeals applied the correct standard of review?

ARGUMENT I

THE TRIAL COURT WAS NOT REQUIRED TO CONSIDER ALL OF THE FACTORS OUTLINED IN MCL 600.2955(1) IN LIGHT OF *EDRY v ADELMAN*, 486 MICH 634 (2010).

In *Edry*, this Court issued its Memorandum Opinion in which it determined that Dr. Barry Singer's expert opinion on causation in a failure to diagnose cancer case was unreliable under MRE 702:

“Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible. [Footnote 6]. Plaintiff has failed to satisfy her burden regarding the admissibility of Dr. Singer's opinion; therefore, the trial court did not abuse its discretion by excluding Dr. Singer's testimony as unreliable under MRE 702. [Footnote 7]

6. Similarly, federal courts applying *Daubert* have held that ‘the whole point of *Daubert* is that an expert can't ‘speculate.’ They need analytically sound bases for their opinions,’ *DePaepe v Gen Motors Corp*, 141 F3d 715, 720 (CA 7, 1988), and ‘[i]t is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate.’ *Goebel v Denver & RGWR Co*, 215 F3d 183, 188 (CA 10, 2000).

7. We need not address MCL 600.2955 in this case because an expert witness who is qualified under one statute may be disqualified on other grounds. See *Woodard v Custer*, 476 Mich 545, 574 n 17, 719 NW2d 842 (2006). Here, Dr. Singer's opinion is inadmissible under MRE 702; therefore, it is unnecessary to consider the admissibility of his opinion under MCL 600.2955.”

Edry, 486 Mich at 642, nn 6, 7. In *Edry*, Dr. Singer acknowledged a textbook as authoritative, but indicated that it was inapplicable to plaintiff's case. Dr. Singer otherwise referred to textbooks and journal articles to support his theory “but plaintiff never produced those authorities to support his [Singer's] testimony.” *Edry*, 486 Mich at 637.

This Court emphasized the lack of literature produced by Dr. Singer or the *Edry* plaintiff as the primary basis why Dr. Singer's opinion was determined unreliable under MRE 702:

“Moreover, no literature was admitted into evidence that supported Dr. Singer's testimony. Although he made general references to textbooks and journals during his deposition, Plaintiff failed to produce that literature, even after the court provided Plaintiff with a sufficient opportunity to do so.”

Edry, 486 Mich at 640 (emphasis supplied).

This Court further noted that although the plaintiff “eventually provided some literature” in a motion to set aside the trial court's order (and thus presumably on reconsideration), “these materials were not peer-reviewed and did not directly support Dr. Singer's testimony.” *Edry*, 486 Mich at 641 (footnote omitted).

The second major basis upon which this Court found Dr. Singer's testimony unreliable was the failure to provide or explain his reasoning process (especially when he had not reviewed the subject articles):

“Moreover, plaintiff never provided an affidavit explaining how Dr. Singer used the information from the websites to formulate his opinion or whether Dr. Singer even reviewed the articles.”

Id. Based on this record, the *Edry* Court found it necessary to apply only MRE 702 because of the lack of supporting literature (rather than determine whether the supporting literature would satisfy the *Daubert*-based factors of MCL 600.2955)¹:

“While peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702, in this case the lack of supporting literature, combined with the lack of other form of support for Dr. Singer's opinion, renders his opinion unreliable and inadmissible under MRE 702.”

¹ *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993).

Edry, 486 Mich at 641 (footnote omitted) (emphasis supplied).

In the circumstances of *Edry*, with the lack of supporting literature, and the lack of any explanation of the expert's reasoning process, applied to the facts of the case, the first and third factors of MRE 702 were left unmet: (1) the testimony is based on sufficient facts or data, and (3) the witness has applied the principles and methods reliably to the facts of the case. Given the lack of supporting literature, in particular, there was no need for the Court to examine the second factor of MRE 702, namely whether the testimony is the product of reliable principles and methods. It is this factor which is complemented and reinforced by the § 2955 factors. As noted by Justice Markman in his dissent in *Chapin v A&L Parts, Inc*, 478 Mich 916, 918; 733 NW2d 23 (2007), "[m]oreover, § 2955 complements and reinforces MRE 702" and the "[a]pplication of these standards constitutes an additional aspect of the trial court's 'gatekeeping role,'" quoting *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067-1068; 729 NW2d 221 (2007).

Edry stands for the proposition that, when vetting expert testimony, there are certain circumstances in which the court need not apply the § 2955 factors. One of those situations is reflected in *Edry*: the lack of any supporting literature and the lack of an explanation of the expert's reasoning process (which would necessarily exclude any showing that the witness applied the principles and methods reliably to the facts of the instant case). Another situation is reflected in this case: the causation opinion testimony is connected to the existing data only by the *ipse dixit* of the expert. In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782-783; 685 NW2d 391 (2004), this Court stated:

"[N]othing in *either* *Daubert* or the Federal Rule of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A

court may conclude there is simply too great an analytical gap between the data and the opinion proffered.”

(emphasis supplied) (quoting *General Electric Co v Joiner*, 522 US 136, 146 (1997)). See Defendants’ Application for Leave to Appeal, pp 29-30.² Relying on “my expertise” does not allow an expert to give an expert opinion under MRE 702. *Zenith Electronics Corp v WH-TV Broad Corp*, 395 F3d 416, 419-420 (CA 7, 2005). As in *Edry*, Plaintiff here did not present testimony and supporting literature which even required the trial court to analyze the § 2955 factors. As explained next, those factors are in addition to and complement and reinforce MRE 702, rather than supplanting it (see Justice Markman’s discussion in *Chapin*, *supra*). Where the proponent of expert testimony does not even trigger the inquiry of whether the testimony is the product of reliable principles and methods, the court need not look at the § 2955 factors that assist the court in making that determination.

In *Clerc*, this Court cited *Gilbert*, 470 Mich at 782, for the proposition that the trial court’s gatekeeping role under MRE 702 mandates a “searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data.” 477 Mich at 1076. “The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and

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The Court of Appeals deferred to Dr. McKee’s personal experience, clinical experience, and 15 case report article, which is stark error: “Thus, Dr. McKee testified that his opinion was based primarily upon his own clinical experience with similar cases” and “his examination of how plaintiff’s symptoms developed,” and “his 2001 study... .” (**Exhibit A**, p 7) (emphasis supplied).

(Defendant’s Application, p 29).

methodology.” (*Id.*) (emphasis supplied). It is “[c]onsistent with this role” that the court “shall” consider all the factors listed in MCL 600.2955(1). *Clerc* stands for the proposition that, if and when the trial court is applying the second factor of MRE 702 — whether testimony is the product of reliable principles and methods — it shall consider the factors of § 2955. As explained earlier, in both *Edry* and this case, the respective trial courts did not have to reach the question of whether the expert testimony was the product of reliable principles and methods due to other fatal deficiencies in the reliability calculus (in *Edry*, the lack of supporting testimony; in *Cullum*, support that was rotely and exclusively *ipse dixit*).

This interpretation of § 2955(1) makes sense and is justified by the construction of the statute.³ The introductory portion of § 2955(1) provides in its entirety:

“(1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that he opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all the following factors:”

³ Statutory language is read according to its ordinary and generally accepted meaning. If the statute’s language is plain and unambiguous, the court assumes that the Legislature intended its plain meaning, and the court shall enforce the statute as written and follow the plain meaning of the statutory language. *Tryc v Michigan Veterans’ Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996). If the Legislature’s intent is clearly expressed by the language of the statute, no further construction is permitted. *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000). The primary goal of statutory construction is to determine and effectuate the intent of the Legislature through reasonable construction and consideration of the purpose of the statute and the object sought to be accomplished. *Gross v General Motors Corp*, 448 Mich 148, 158-159; 528 NW2d 707 (1995). Where a statute is clear and unambiguous, judicial construction is precluded. *Mino v McCarthy*, 209 Mich App 302, 304; 530 NW2d 779 (1995).

From there, the Legislature lists seven factors, five of which are taken primarily from *Daubert*, and the other two which are extrapolated from the terms of *Daubert*.⁴ Section 2955 applies to a scientific opinion rendered by an “otherwise qualified expert,” which suggests that there are avenues by which expert testimony can be excluded outside of application of § 2955. Next, the statute mentions an opinion being “reliable” and assisting the trier of fact, and that the trial court, “[i]n making that determination,” shall take several steps. They include examining the opinion and the basis for the opinion (the basis to include the “facts, technique, methodology, and reasoning relied upon on the expert”), and then the trial court “shall consider all of the following factors.” This language suggests that the § 2955 factors are used to perform step (2) of the MRE 702 analysis in death and personal/property injury cases, namely a demonstration that “the testimony is the product of reliable principles and methods.” This conclusion is further supported by the Court of

⁴ (a) Whether the opinion and its basis have been subjected to scientific testing and replication.

(b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, “relevant expert community” means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

Appeals' treatment of *Clerc* upon remand from this Court. That panel found that the expert's testimony was the product of reliable principles and methodology, meeting the factors of § 2955(1)(b), (e), (f) and (g), upon determining that backward staging of cancer is a generally accepted methodology supported by medical literature and relied upon by oncologists in their treatment of patients. Once again, this analysis suggests that the § 2955 factors are used to perform step (2) of the MRE 702 analysis — determining whether the testimony is the product of reliable principles and methods.

The sequence of the release of the seminal United States Supreme Court decisions and the enactment of MCL 600.2955(1) suggest the statute encompasses some, but not all, of the factors set forth in the later-amended, and more recent, MRE 702.

Daubert was released in 1993. In response to *Daubert*, the Michigan Legislature enacted § 2955(1) in an apparent effort to codify the Supreme Court's holding in that case. See *Greathouse v Rhodes*, 242 Mich App 221, 238; 618 NW2d 106 (2000), *rev'd on other grounds*, 465 Mich 885; 636 NW2d 138 (2001); *Chapin*, 478 Mich at 918 (Markman, J, dissenting). MCL 600.2955, added to Michigan law by 1995 PA 249, became effective on March 28, 1996. As indicated, it incorporated the five *Daubert* standards enunciated by the United States Supreme Court. *Daubert* instructed trial courts to assess whether the reasoning or methodology underlying expert testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts of the case at issue. In that sense, *Daubert* required a valid scientific connection to the pertinent inquiry, grafted onto FRE 702.

Several matters were left open in *Daubert*, one of which is at issue in this case: whether the proponent can satisfy the burden of demonstrating admissibility by pointing

solely to the expert's own subjective methodology and support to establish the reliability of the expert opinion. That concept was explored by the United States Supreme Court in *Joiner* two years later, in 1997. The *Joiner* court rejected a strict standard of review imposed by the respective circuit court appellate courts,⁵ and opted for an abuse of discretion standard on appeal. 522 US at 143, 146. The Court then held that nothing in *Daubert* or the Federal Rules of Evidence required a trial court to admit opinion evidence supported by data considered *ipse dixit* of the expert. *Id.* at 146. In such situations, courts were free to conclude that there was simply "too great an analytical gap between the data and the opinion proffered." *Id.* Since *Joiner* was decided after the enactment of MCL 600.2955, the § 2995 factors do not specifically include the prohibition upon *ipse dixit* of the expert to establish reliability.

In 1999, the Supreme Court decided *Kumho Tire Company, Ltd v Carmichael*, 526 US 137 (1999), in which the United States Supreme Court held that the trial court's gatekeeping function goes beyond scientific evidence to encompass all expert testimony. Again, § 2955 was enacted before the release of *Kumho Tire*.

In 2000, Congress amended FRE 702 to make clear that all adversarial expert testimony is subject to the reliability test. See generally FRE 702. The Rule mandated that for expert testimony to be admissible, an expert witness must not only utilize reliable principles and methods (the topic of *Daubert* and § 2955), but must have "applied the principles and methods reliably to the facts of the case." As such, experts were prevented

⁵ See footnote 8, *infra*.

from relying on informed speculation and educated guesses.⁶ MRE 702, in its present form, is “identical with Rule 702 of the Federal Rules of Evidence except for the addition after the word “If” of the phrase “the court determines that recognized.” See Comment to 1978 Note. The staff comment to the 2004 amendment, which again brought MRE 702 into conformity with the amended FRE 702, makes clear that the words “the court determines that” were retained to “emphasize the centrality of the court’s gatekeeping role and excising unproven expert theories and methodologies from jury consideration.”

This sequence demonstrates that the present version of MRE 702 is broader and encompasses more considerations than the earlier-enacted § 2955(1), which encompassed the reasoning of *Daubert* (released two years earlier), but does not reflect the subsequent refinement and tightening of *Daubert* in *Joiner* (released in 1997) and *Kumho Tire* (released in 1999). In turn, MRE 702, amended after *Joiner* and *Kumho Tire* were issued, is broader in its exclusionary criteria. There are situations, such as in *Edry* and in this case, where the broader terms of MRE 702 apply to disqualify an expert on lack of reliability, and the court need not apply the more narrow (albeit more in-depth) factors of § 2955(1).

For these reasons, the trial court in the instant case properly examined the lack of independent data submitted by Dr. McKee and determined properly that under the terms of MRE 702, the opinion was unreliable. There was no need under these circumstances to apply the § 2955(1) factors because, given the limited *ipse dixit* nature of the proffered support for Dr. McKee’s expert opinion, the trial court did not have to specifically analyze

⁶ In 2011 Congress amended FRE 701 and 702 to avoid a situation where a party would seek to have expert testimony admitted as “lay opinion” testimony under Rule 701. That rule was clarified that it applied only to testimony “not based on scientific, technical, other specialized knowledge within the scope of Rule 702.”

whether the testimony was the product of reliable principles and methods. “Reliability” in this sense cannot come from the expert himself, but must be derived from independent sources.

ARGUMENT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT PLAINTIFF'S EXPERT OPINION WAS INADMISSIBLE UNDER MRE 702 BECAUSE IT WAS BASED ON SPECULATION.

The trial court properly determined (and thus did not abuse its discretion) that the causation opinion of Dr. McKee was inadmissible under MRE 702 because it was based on speculation. In *Edry*, this Court cited to federal case law indicating that the driving force behind *Daubert* is the notion that an expert cannot speculate. *Edry*, 486 Mich at 642, fn 6, citing *DePaepe v Gen Motors Corp*, 141 F3d 715, 720 (CA 7, 1998) (experts cannot speculate and must have sound analytical bases for their opinions); *Goebel v Denver & RGWR Co*, 215 F3d 1083, 1088 (CA 10, 2000) (it is axiomatic that the existence of credentials do not permit an expert to speculate). When, as here, a party relies simply on the expert's expertise and background to establish reliability, the resulting opinion is to be considered speculative, and therefore unreliable.

As presented and supported in Defendant's application, Dr. McKee cited to his own credentials as well as his own study conducted in 2001, in support of his causation opinion that a short-course steroids therapy resulted in Plaintiff developing AVN. As explained in Argument I, the *ipse dixit* nature of this testimony prevents Plaintiff from even reaching the second element of MRE 702: whether the testimony is the product of reliable principles and methods. In addition, Dr. McKee's study was statistically insignificant, involving only 15 patients, with only one who received the same dosage as Plaintiff. See Defendant's Application, pp 5-6. Since there was only one case study similarly-situated to Plaintiff, Dr. McKee was simply speculating that here short-course steroid therapy caused Plaintiff's

alleged AVN. Moreover, by definition, an expert who can point to only one case study to support his causation opinion in a particular case is not applying principles and methods reliably *to the facts of the case*. See MRE 702(3). One study does not constitute a “principle or method,” whether characterized as “my expertise” or otherwise.

The speculative nature of the testimony is further illustrated by Dr. McKee’s failure to explain away the possible effect of Plaintiff’s excessive alcohol consumption on the alleged development of AVN. Dr. Mayo testified that the fact that Plaintiff was drinking substantial amounts of alcohol increased his risk for AVN. Dr. McKee did not cite to a study establishing a relationship between patients who consumed significant alcohol and underwent short-course steroid therapy, and the development of AVN. This testimony adds to the speculative nature of Dr. McKee’s opinion because, under *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994), Dr. McKee’s opinion amounts to mere conjecture, namely a simple explanation consistent with known facts or conditions, but not deducible therefrom as a reasonable inference. Moreover, under *Skinner*, it was incumbent upon Plaintiff through Dr. McKee to eliminate with reasonable certainty other alternative causes of the AVN. This was not done in the four corners of Dr. McKee’s testimony, or otherwise. In this sense, the Court of Appeals erred in two regards: (1) reversing the trial court’s finding that Dr. McKee’s 2001 study was insufficient to form an adequate basis for a causation opinion; and (2) failing to afford the requisite degree of discretion and deference to the trial court under the applicable standard of review (discussed next).

ARGUMENT III

ALTHOUGH THE COURT OF APPEALS STATED THE CORRECT STANDARD OF REVIEW, IT DID NOT PROPERLY APPLY THAT STANDARD TO THE TRIAL COURT'S DECISION.

The Michigan Court of Appeals determined that the trial court abused its discretion in two regards: (1) inadequate performance of its gatekeeper role under MRE 702 “[b]y failing to consider substantial evidence forming the basis for Dr. McKee’s opinion” (**Exhibit A**, p 7); and (2) reaching the ultimate conclusion that Dr. McKee’s expert opinion testimony on the issue of causation was inadmissible (*Id.* at 8).⁷ Michigan law provides that the decision to exclude or admit evidence is discretionary with the trial court. *Craig v Oakwood Hospital*, 471 Mich 67, 76; 684 NW2d 296 (2004). Whether expert testimony may be presented to the jury is also a matter of discretion for the trial court. *Edry, supra; Siirila v Barrios*, 398 Mich 576, 591; 248 NW2d 171 (1976) (ordinarily, the qualification of competency of expert witnesses is a matter for the discretion of the trial judge). Michigan’s application of the abuse of discretion standard to such items is consistent with federal law. See *Joiner*, 522 US at 142-143 (the question of admissibility of expert testimony under FRE 702 is reviewable on appeal under an abuse of discretion standard).⁸ As explained in

⁷ The Court of Appeals also determined that the trial court “improperly weighed the relative value of testimonial evidence presented by each party and inappropriately made credibility determinations in reaching its decision to exclude Dr. McKee’s causation testimony.” (**Exhibit A**, pp 8-9). It is not evident from its opinion what standard of review the Court of Appeals applied by finding error on this point.

⁸ The decision in *Joiner* was the United States Supreme Court’s retort to federal circuit court appellate decisions applying a “more stringent review” of district court trial rulings excluding plaintiffs’ causation evidence. See e.g. *In re Paoli Railroad Yard PCP Litigation*, 35 F3d 717, 749-750 (CA 3, 1994); *Joiner v General Electric Company*, 578 F3d 524, 529 (CA 11, 1996) *rev’d*, 522 US 136 (1997)) (the court applied a “particularly stringent standard of review” of the district court’s decision in that case to exclude expert testimony).

Defendant's application, specifically page 19, the Court of Appeals did not afford the requisite discretion to the trial court's exclusion of Dr. McKee's opinion testimony under MRE 702. In *Maldonado v Ford Motor Company*, 476 Mich 372, 388; 719 NW2d 809 (2006), this Court adopted the definition of abuse of discretion from *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).⁹ The abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome, but rather there will be more than one reasonable and principled outcome. *Maldonado, supra*. Therefore, "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.*

This test for abuse of discretion, although cited by the Court of Appeals at page 5 of its Opinion, was not applied to the circumstances of the case. At page 7 of the Opinion, the Court of Appeals found that the trial court did not take into account Dr. McKee's clinical experience with similar cases, and his examination of how this Plaintiff's symptoms developed. Yet, as explained, the "my experience" expert opinion is insufficient to establish compliance with MRE 702, and thus to establish reliability. Indeed, *Joiner* is the federal case which adopted "abuse of discretion" as the proper standard of review, and did so in the context of discrediting an expert's opinion based on his *ipse dixit*.

⁹ The Court recognized but refused to adopt as the "default abuse of discretion standard" the standard set forth in *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), that an abuse occurs "only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'"

Although trial courts have considerable discretion in determining whether a witness is qualified to testify as an expert, the trial court must nonetheless accurately apply the law in the exercise of such discretion. See *Gilbert*, 470 Mich at 780 (“while the exercise of this gatekeeper role is within the court’s discretion, a trial judge may neither ‘abandon’ this obligation nor ‘perform the function inadequately’”), quoting *Kumho Tire*, 526 US at 158-159 (Scalia, J., concurring). This is consistent with this Court’s statement that questions of law underlying a trial court’s evidentiary decisions, such as the construction of a constitutional provision, a court rule or a statute, and here, a rule of evidence, are reviewed *de novo*. *Barnett v Hidalgo*, 478 Mich 151, 159; 532 NW2d 472 (2007); *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002); *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1997) (where the decision regarding the admissibility of evidence involves a preliminary question of law, that question is reviewed *de novo*). More precisely, this Court reviews *de novo* whether the trial court correctly selected, interpreted, and then applied the law. *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010). Under this law, if the trial court as the gatekeeper does not adequately perform gatekeeping functions (to be distinguished from the correctness of the result of the trial court’s gatekeeping in any single case), then the issue is reviewed *de novo* by this Court. For example, if a trial court misinterpreted the terms of MRE 702, or simply refused, when necessary, to apply one of its three subparts, this would be a preliminary issue of law reviewed *de novo* by the Court. In contrast, the result reached by the trial court on the question of admissibility under MRE 702, and reliability generally, is entrusted to the sound discretion of the trial court. It is reviewed for an abuse of discretion.

By reviewing a trial court's decision concerning the admission of expert testimony under this highly deferential standard, appellate courts recognize that the trial court's assessment of the proposed expert and his or her testimony typically involves a complex balancing of various factors. See, e.g., *Daubert*, 509 US at 592–595 (noting that, in reviewing the admission of expert testimony, trial courts must consider a variety of factors—including being mindful of other applicable rules—to determine the evidentiary relevance and reliability of the proposed testimony). The same is true when examining a witness's qualifications; the court must weigh the witness's “knowledge, skill, experience, training, [and] education” and determine whether, on the basis of those factors, the witness is sufficiently qualified to offer expert testimony on the area at issue. MRE 702. There is always the concern that jurors will disregard their own common sense and give inordinate or dispositive weight to an expert's testimony. See *People v Peterson*, 450 Mich 349, 374; 537 NW2d 857 (1995) (noting the potential that a jury might defer to an expert's seemingly objective view of the evidence). For that reason, trial courts must—at every stage of the litigation—serve as the gatekeepers who ensure that experts and their proposed testimony meet the threshold requirements of reliability. *Gilbert*, 470 Mich at 782. This includes determining whether the witness's expertise fits the nature of the witness's proposed testimony. *Id.* at 789. These are highly individualized matters which require a hands-on approach, an in-depth knowledge of the facts of the particular case, a first-hand observation of the witnesses, and the opportunity to ask questions and probe the proffered support for the expert's opinion.

For these reasons, the abuse of discretion standard is correct for appellate review of the trial court's determination of admissibility, including reliability under MRE 702.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Defendant-Appellant Frederick L. Lopatin, D.O. requests this Court issue an order which peremptorily reverses the Court of Appeals July 10, 2014 Opinion, and reinstate the trial court's grant of summary disposition. In the first alternative, Defendant requests this Court grant leave to appeal, consider this case on a calendar basis, and issue the same relief. Defendant also requests the recovery of all costs and attorney fees so wrongfully sustained on appeal.

Respectfully submitted,

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