MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Terra Limited Partners, Ltd. and Stephen Gould Corporation,

Appellants-Defendants,

v.

Erin Delvecchio, as Wife and Administrator of the Estate of Michael Delvecchio, deceased,

Appellee-Plaintiff.

July 14, 2021

Court of Appeals Case No. 21A-CT-325

Appeal from the Marion Superior Court

The Honorable Gary L. Miller, Judge

Trial Court Cause No. 49D03-1810-CT-43157

Najam, Judge.

Statement of the Case

[1] Terra Limited Partners, Ltd. ("Terra") brings this interlocutory appeal from the trial court's denial of Terra's motion to limit or preclude the testimony of two expert witnesses on behalf of Erin Delvecchio, as the wife and administrator of the estate of Michael Delvecchio.[1] Terra raises a single issue for our review, namely, whether the trial court abused its discretion under the Indiana Rules of Evidence when it declined Terra's motion to limit or preclude the expert witnesses' testimony.

[2] We affirm in part and reverse in part.

Facts and Procedural History

[3] In October of 2018, Erin filed her complaint against Terra, which she later amended.[2] In her amended complaint, Erin alleged that Terra employees had overserved alcohol to her husband, Michael, at a Ruth's Chris Steakhouse on the north side of Indianapolis in violation of Indiana's Dram Shop Act, Ind. Code §§ 7.1-5-10-15 to 15.5 (2020). As a result, Erin alleged, Michael "attempted to slide down a stair handrail in the restaurant and fell, which resulted in his injury and subsequent death." Appellant's Br. at 9.

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[1] Stephen Gould Corporation, also a named defendant in the trial court, does not participate in this appeal.

[2] The parties have not included the amended complaint in the appendix. We therefore rely on Terra's undisputed representations as to what the complaint alleges.

[4] In 2019, Terra moved for the entry of partial summary judgment. The trial court granted Terra's motion and entered judgment for Terra as a matter of law on Erin's "claims under Indiana's Survivorship Statute." Appellant's App. Vol. 3 at 41. The court further restricted Erin's only remaining claim, for wrongful death, such that Erin was barred from seeking "attorneys' fees, punitive damages, *or damages for pain and suffering*" under that claim. *Id.* at 41-42 (emphasis added).

[5] In late 2020, with a trial date set for September of 2021, Terra moved "to [l]imit or [p]reclude [t]estimony of [Erin's e]xperts." Appellant's App. Vol. 2 at 26. In particular, Terra sought to limit the testimony of Erin's expert toxicologist, Dr. Charles McKay, and her medical expert, Dr. Robert Gregori. In most relevant part, Dr. McKay would testify to the following conclusions:

> [Michael's] likely BAC equivalent in excess of 0.26g% [at the time of the fall] indicated the consumption of more than 12 standard drinks, resulting in impairment in judgment, insight, visual perception, complex reaction time, balance, and motor coordination. It is likely that these impairing effects of alcohol, as well as the odor associated with alcohol consumption and metabolism, slurring of speech, and other visual evidence of alcohol intoxication were evident while [Michael] was being served alcohol . . . .

Id. at 58. And Dr. Gregori would testify to the following conclusions:

> I believe that more likely than not that the cause of [Michael's] death was due to the complications he sustained as a result [of his fall]. Moreover, there is no evidence that he died from any other condition . . . .

> It is not possible to know the extent of pain and suffering on the part of [Michael] because of his persistent vegetative state [between the fall and his death several months later]. However, the effects of this type of injury on a family or loved ones are often profound and heart wrenching . . . . Severe brain trauma has been described as losing a loved one but still having the body around as a constant reminder of what has been lost. It is an ordeal of despair versus hope and[,] oftentimes, the family of the individual is left emotionally devastated.

Id. at 194. The trial court summarily denied Terra's motion six days after Terra had filed it. The court then certified its order for interlocutory appeal, which we accepted.

Discussion and Decision

Standard of Review

[6] On appeal, Terra asserts that the trial court erred when it denied Terra's motion to limit or preclude the testimony of Dr. McKay and Dr. Gregori. Although not captioned as such, Terra's motion was in operation and effect a motion in limine to exclude or limit the testimony of Erin's expert witnesses. *See, e.g.*, *Mitchell v. State*, 742 N.E.2d 953, 956 (Ind. 2001). "We generally review a trial court's decision to admit or exclude evidence for an abuse of discretion." *Patchett v. Lee*, 60 N.E.3d 1025, 1028 (Ind. 2016). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Sims v. Pappas*, 73 N.E.3d 700, 705 (Ind. 2017).

Indiana Evidence Rule 702

[7] Much of Terra's arguments on appeal are centered around Indiana Evidence Rule 702, which discusses expert testimony. Specifically, Rule 702 provides:

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

As the Indiana Supreme Court has explained:

> *Daubert [v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993),] concerns the application of Federal Rule of Evidence 702 which, like Indiana Evidence Rule 702, permits qualified expert opinion testimony related to "scientific, technical, or other specialized knowledge" where such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; Ind. Evid. R. 702(a). The Indiana rule further requires 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. Evid. R. 702(b) (emphasis added); *see Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003). . . .
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> Although Indiana courts are not bound by *Daubert*, we have previously noted that "'[t]he 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.'" *Malinski*, 794 N.E.2d at 1084 (quoting

> *McGrew v. State*, 682 N.E.2d 1289, 1290 (Ind. 1997)). Though we may consider the *Daubert* factors 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). We therefore find *Daubert* helpful, but not controlling, when analyzing testimony under Indiana Evidence Rule 702(b). . . .
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> Indiana's Rule 702 is not intended "to interpose an unnecessarily burdensome procedure or methodology for trial courts." *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 460 (Ind. 2001). "[T]he adoption of Rule 702 reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence." *Id.* As the Supreme Court instructed in *Daubert*, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596, 113 S. Ct. 2786. Evidence need not be conclusive to be admissible. "The weakness of the connection of the item [of evidence] to the defendant goes toward its weight and not its admissibility." *Owensby v. State*, 467 N.E.2d 702, 708 (Ind. 1984). Cross-examination permits the opposing party to expose dissimilarities between the actual evidence and the scientific theory. The dissimilarities go to the weight rather than to the admissibility of the evidence. *See Lytle v. Ford Motor Co.*, 696 N.E.2d 465, 476 (Ind. Ct. App. 1998), *trans. denied*.

Turner v. State, 953 N.E.2d 1039, 1050-51 (Ind. 2011) (some citations and quotation marks omitted). For example, where expert testimony "would 'help the trier of fact'" and was based on stated "calculations and methodology," our Supreme Court held, in a succinct analysis, that the opposing party's challenge to the expert testimony went to the "weight, not admissibility," of that

testimony. *Escamilla v. Shiel Sexton Co., Inc.*, 73 N.E.3d 663, 676-77 (Ind. 2017). With that background in mind, we turn to Terra's arguments on appeal.

Dr. McKay's Proffered Testimony

[8] We first address Terra's challenge to Dr. McKay's proffered testimony. There is no dispute that Erin's wrongful death claim against Terra under Indiana's Dram Shop Act requires Erin to show, among other things, that Terra had "actual knowledge" that Michael was "visibly intoxicated" when Terra continued to serve him alcohol. I.C. § 7.1-5-10-15.5(b)(1). The essence of Dr. McKay's testimony would be that, given Michael's likely BAC at the time of his fall, he was likely to have been visibly intoxicated while being served alcohol shortly before the fall.

[9] Terra asserts that Dr. McKay's testimony is inadmissible under Evidence Rule 702 because it is not based on reliable scientific bases. In particular, Terra levies the following criticisms of Dr. McKay's testimony:

- Terra alleges that Michael was an alcoholic and therefore had a high tolerance for alcohol.
- Terra asserts that Dr. McKay's reliance on one study to reach a conclusion on Michael's likely blood-alcohol levels based on video-recordings of Michael at the restaurant is not scientifically reliable because the subjects in that study had a different blood-alcohol level than Dr. McKay attributed to Michael. Terra also complains that that study "had many limitations." Appellant's Br. at 20.
- Terra offers other studies to challenge Dr. McKay's conclusions.
- Terra challenges Dr. McKay's conclusion that, given Michael's likely BAC at the time of the fall and Terra's assertion that he was an alcoholic, it would have been difficult for Michael to develop a tolerance to that

level of alcohol "in less than months of drinking on a regular basis," *see* Appellant's App. Vol. 2 at 127, when studies show alcohol tolerance can build up in just a few days.

- Terra asserts that Dr. McKay's methodology is not reliable because it is not known how much alcohol Michael was served, when he was served it, when he last consumed it, or how much food he may have had along with the alcohol.

But Dr. McKay explains his expert background, his calculations, his methodology, and a list of studies and other information he relied on in forming his opinions. *Id.* at 53-70. Each of Terra's above arguments essentially assert that Dr. McKay's conclusions are not credible, which is just that—an attack on credibility, not admissibility. *See Escamilla*, 73 N.E.3d at 676-77. Terra is free to present its attacks on Dr. McKay's credibility and its contrary evidence on cross-examination or through Terra's own expert witnesses. We cannot say the trial court was required as a matter of law to exclude Dr. McKay's testimony on these bases.

[10] Terra additionally challenges Dr. McKay's "narrative summaries" of certain proffered evidence. Appellant's Br. at 29-32. Terra's several arguments here appear to suggest that Dr. McKay's "narrative" testimony is inadmissible both because it reviews otherwise inadmissible evidence or statements and also because it opines on material that should speak for itself to the jury, such as the video-recordings of Michael inside the restaurant. But Indiana's Evidence Rules expressly permit experts to opine in some circumstances on "facts or data in the case that the expert has been made aware of or personally observed," Evid. R. 703, including "inadmissible evidence," *id.*, and including testimony

that might "embrace[] an ultimate issue," Evid. R. 704. Terra has not shown how the trial court may have abused its discretion under those Evidence Rules in denying Terra's motion.[3] Accordingly, we cannot say the trial court erred in denying Terra's motion with respect to Dr. McKay.

Dr. Gregori's Proffered Testimony

[11] Terra also asserts that the trial court abused its discretion when it denied Terra's motion to limit or exclude the testimony of Dr. Gregori. Erin's wrongful death claim against Terra requires Erin to show, again, among other things, that "the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death . . . ." I.C. § 7.1-5-10-15.5(b)(2). The essence of Dr. Gregori's testimony would be that Michael's injuries from his fall "more likely than not" caused his death. Appellant's App. Vol. 2 at 194.

[12] Terra first asserts that Dr. Gregori's conclusion "is unnecessary and cumulative" because Terra is not disputing that Michael's fall caused his death. Appellant's Br. at 32. But Terra does not demonstrate that there is a stipulation in the record on Michael's cause of death. Terra cites instead to the trial court's entry of partial summary judgment, but that order limits the scope of damages

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[3] In its Reply Brief, Terra argues for the first time that Erin seeks to use her experts as "a mere conduit to present inadmissible evidence in front of the jury." Reply Br. at 13-14. Arguments raised for the first time in a reply brief are waived. In any event, Terra's argument in its Reply Brief on this point still does not present argument supported by cogent reasoning with respect to Dr. McKay's "narrative" testimony.

Erin may pursue at trial. It does not, on its face at least, absolve Erin of her burden at trial to demonstrate proximate cause.

[13] Terra also asserts that Dr. Gregori's review of Michael's medical history between the fall and his death is both irrelevant and based on inadmissible hearsay. But it is relevant insofar as it shows that there were no intervening or other causes of death, and under Evidence Rule 703 Dr. Gregori's conclusions may be based on inadmissible evidence in some circumstances. Terra does not discuss Rule 703 and, as such, does not present argument supported by cogent reasoning as to why it would not apply here.

[14] Finally, and most critically, Terra asserts that the trial court abused its discretion when it did not prohibit Dr. Gregori from testifying to pain and suffering. Again, in his proffered testimony, Dr. Gregori concluded:

> It is not possible to know the extent of pain and suffering on the part of [Michael] because of his persistent vegetative state [between the fall and his death some eight months later]. However, the effects of this type of injury on a family or loved ones are often profound and heart wrenching . . . . Severe brain trauma has been described as losing a loved one but still having the body around as a constant reminder of what has been lost. It is an ordeal of despair versus hope and[,] oftentimes, the family of the individual is left emotionally devastated.

Appellant's App. Vol. 2 at 194. On this point, we agree with Terra. The trial court's entry of partial summary judgment expressly prohibited Erin from

seeking damages for pain and suffering.[4] Accordingly, evidence relating to pain and suffering is not relevant in this trial.[5] We accordingly reverse the trial court's denial of Terra's motion to prohibit any reference to pain and suffering.

Conclusion

[15] In sum, we affirm the trial court's denial of Terra's motion to limit or preclude the testimony of Dr. McKay and Dr. Gregori in all respects save Dr. Gregori's proffered testimony on pain and suffering, which is no longer relevant in light of the trial court's entry of partial summary judgment. Therefore, we affirm in part and reverse in part.

[16] Affirmed in part and reversed in part.

Pyle, J., and Tavitas, J., concur.

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[4] This appeal does not present us with the question of whether the partial summary judgment's prohibition against damages for pain and suffering was correct.

[5] As we conclude that Dr. Gregori's conclusions on pain and suffering are no longer relevant, we need not consider Terra's alternative argument that the trial court erred under Indiana Evidence Rule 403 in denying Terra's motion with respect to these conclusions.