

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

CNH INDUSTRIAL AMERICA LLC,	)	
	)	
Plaintiff,	)	C.A. No. N12C-07-108 EMD CCLD
	)	
v.	)	
	)	
THE TRAVELERS INDEMNITY	)	TRIAL BY JURY OF TWELVE
COMPANY	)	DEMANDED
	)	
Defendant.	)	
	)	
	)	

**ORDER DENYING MOTION OF PLAINTIFF CNH INDUSTRIAL AMERICA LLC’S  
MOTION FOR LEAVE TO DISCLOSE DR. CHARLES WEAVER AS EXPERT  
WITNESS REGARDING “INSURED ISSUES”**

This 19<sup>th</sup> day of February, 2015, upon consideration of the Motion of Plaintiff CNH Industrial America LLC’s Motion for Leave to Disclose Dr. Charles Weaver as Expert Witness Regarding “Insured Issues” (the “Motion”) filed by CNH Industrial America, LLC (“CNH”); the Opposition of Defendant The Travelers Indemnity Company to the Motion of Plaintiff CNH Industrial America LLC’s Motion for Leave to Disclose Dr. Charles Weaver as Expert Witness Regarding “Insured Issues” (the “Response”) filed by The Travelers Indemnity Company (“Travelers”); the Plaintiff CNH Industrial America LLC’s Reply in Support of Its Motion for Leave to Disclose Dr. Charles Weaver as Expert Witness Regarding “Insured Issues” (the “Reply”) filed by CNH, the Court finds as follows:

1. On December 10, 2014, CNH filed the Motion. The Motion seeks leave to disclose Dr. Charles Weaver (“Dr. Weaver”) as an expert witness to describe and explain to the jury various factors that have been demonstrated scientifically to compromise the reliability of

eyewitness memory. CNH proffers that Dr. Weaver will apply such scientific factors to the testimony of one of Travelers' witnesses, Mr. Gary Bennett ("Mr. Bennett"). On January 12, 2015, Travelers opposed by filing the Response. Thereafter, CNH filed the Reply.

2. Whether Dr. Weaver's expert testimony should be admitted turns on whether such testimony is relevant and reliable in assisting the trier of fact. Under Rule 702 of the Delaware Rules of Evidence, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify if the testimony is based upon sufficient facts or data; the testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case.<sup>1</sup> When an expert's opinion is challenged, the trial judge acts as the gatekeeper and must determine whether the expert testimony is both relevant and reliable.<sup>2</sup>

3. CNH contends that Dr. Weaver's testimony is admissible, because it will assist the jury to better understand the scientific principles that influence human memory and apply such principles to Mr. Bennett's testimony. CNH points to the fact that Dr. Weaver has been admitted to testify on similar principles in approximately thirty-five (35) other cases. CNH also claims that its request for leave to disclose Dr. Weaver's testimony is timely in light of Travelers' failure to fully respond to CNH's discovery requests.

4. In opposition, Travelers argues that Dr. Weaver's expert memory testimony is inadmissible because it would not assist the trier of fact to understand the evidence or to determine a fact at issue. Travelers notes that Dr. Weaver's testimony goes to the credibility of the witness – a question for the jury to determine at trial. Travelers also contends that it fully

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<sup>1</sup> D.R.E. 702.

<sup>2</sup> *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 588 (Del. 2000) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)).

responded to CNH's discovery request and that CNH's expert disclosure is untimely under the Case Management Order.

5. CNH asserts that Dr. Weaver will not comment on the credibility of Mr. Bennett's testimony, but instead provide the jury with an accurate framework with which to evaluate Mr. Bennett's memory. However, the framework CNH attempts to provide through Dr. Weaver directly attacks Mr. Bennett's ability to remember events that occurred 30 to 40 years ago. In doing so, the framework attacks Mr. Bennett's ability to testify truthfully on such events, and thus undermines his credibility. In CNH's own words, Dr. Weaver's testimony will explain factors that "impact the reliability and accuracy of such memories" and then relate these factors to Mr. Bennett's testimony.

6. "[E]xpert testimony impermissibly invades the province of the jury if it embraces matters in which 'the jury is just as competent as the expert to consider and weigh the evidence and draw necessary conclusions.'"<sup>3</sup> This Court previously barred Dr. Weaver from testifying as an expert witness on memory, finding that the testimony was "sufficiently within the common knowledge and experience of the jury."<sup>4</sup> Here, the testimony CNH attempts to disclose is the exact testimony previously rejected by this Court as invading the province of the jury in considering and weighing the evidence. Accordingly, the evidence is not relevant in assisting the trier of fact to understand the evidence or to determine a fact at issue.

7. The Court believes that allowing Dr. Weaver's proposed expert testimony in this case could open the door for parties to attack the credibility of a witness through what they term

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<sup>3</sup> *Wheat v. State*, 527 A.2d 269, 272-273 (Del. 1987) (citing *IBN-TAMAS v. United States*, D.C. App., 407 A.2d 626, 632 (1979)) (quoting *Lampkins v. United States*, D.C. App., 401 A.2d 966, 969 (1979)).

<sup>4</sup> *See in re: Asbestos Litigation*, No. 032010JR Trial Grp., at 88 (Del. Super. Ct. Mar. 4, 2010) (p.88).

a memory expert in all cases. Because it is the jury's role to assess a witness' credibility, such testimony should not be allowed. CNH may certainly attack Mr. Bennett's memory on cross examination and discuss evidence produced at trial relating to this issue during closing argument; however, it may not use an expert witness to make such an attack.

**IT IS ORDERED** that the Motion is **DENIED**.

Dated: February 19, 2015  
Wilmington, Delaware

*/s/ Eric M. Davis* \_\_\_\_\_  
Eric M. Davis  
Judge