IN THE SUPREME COURT OF IOWA

No. 19-2137

WILLIAM MCGREW and ELAINE MCGREW,

Plaintiffs-Appellants,

vs.

EROMOSELE OTOADESE, M.D. and NORTHERN IOWA CARDIOVASCULAR AND THORACIC SURGERY CLINIC, P.C.,

Defendants-Appellees

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR BLACK HAWK COUNTY
THE HONORABLE KELLYANN M. LEKAR, JUDGE

APPELLANTS' FINAL REPLY BRIEF

Martin Diaz AT0002000
1570 Shady Ct. NW
Swisher, IA 52338
(319) 339-4350
(319) 339-4426 Fax
marty@martindiazlawfirm.com
Attorney for Appellants

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REPLY ARGUMENT

ISSUE I: EXCLUSION OF EXPERT TESTIMONY

A. The Trial Court's ruling was premised on the McGrews having properly designated and disclosed Dr. Bekavac and Dr. Halloran as experts.

In their Brief, Defendants spend a great deal of time arguing that Drs. Bekavac and Halloran were retained experts. But as noted in the McGrews' initial brief, the Trial Court made it very clear that it had no issue with regard to the designation and disclosure of these two doctors---whether deemed retained or non-retained. Defendants quibble with the words used by the Trial Court in reflecting the court's analysis, but the Trial Court made it abundantly clear that it had no trouble with plaintiff's compliance with Iowa Code §668.11 and Iowa Rule 1.500(2). (*See* Trial Day #1, Tr. p. 41, L. 10 – p. 14; Tr. p. 45, L. 24 – p. 46, L. 14) ("So I'm not gonna worry about the disclosure. I think everybody had what everybody had and everybody knew what everybody said long far enough in advance. There's no surprise to anyone here.").

The Trial Court's analysis must be viewed through that lens. The Trial Court confirmed that these expert witnesses had been properly designated, and their proposed testimony was properly disclosed. Once properly designated and opinions disclosed, an expert's testimony is governed by Iowa

R. Evid. 5.702. These witnesses were qualified to testify, and their testimony would aid the trier of fact "to understand the evidence or to determine a fact in issue." The next question is whether it has any discretion to exclude otherwise relevant and probative testimony. At no point does the Trial Court evaluate the evidence under Iowa R. Evid. 5.403. Therefore, any argument made by the defense that the evidence should have been excluded on the basis that it was more prejudicial than probative is meritless.

A glimpse into the Trial Court's thought process is reflected in a statement made during the first day of trial, when the court indicated its "gut reaction":

> THE COURT: …..I can tell you what my initial gut reaction is, and that's what I've told you to this point and that is that when I -- when I approach this and I look at, are we going to just -- you know, are we going to go out and poll every doctor in Black Hawk County and say, hey, take a look at this. What do you think? Well, I don't know. What do you think? I don't know. How do we curb that? We curb that by having people – having plaintiffs in these cases identify their expert witnesses. And I know you're in an odd circumstance here because these are not people you could go out and retain because they don't wish to be retained.
>
> MR. DIAZ: But I identified them.
>
> THE COURT: You did. You did, and I -- there is nothing that's been -- I don't think Ms. Rinden's even said anything about the fact that there hasn't been full disclosure. There's been full disclosure. You know, the question is, to what extent can you go out and pick whatever odd doctor you want -- I'm not saying these are odd doctors. I'm just saying, you know, pick whatever doctor you want off the street and say, hey, what do you think of this and bring that person

> in to testify. And that's where I struggle, in my gut reaction, to this circumstance.
>
> And I'm not saying that they didn't even mean well by what they did. They were trying to help their patient as the patient presented to them, but we're talking about a legal issue that has to be presented to a jury, and a jury has to make a legal decision.

(Trial Day #1, p. 40, L. 23 – p. 41, L.25).

Ultimately, the Trial Court's analysis is based *solely* on its erroneous interpretation of *Hansen v. Cent. Iowa Hosp. Corp*., 686 N.W.2d 476 (Iowa 2004). The Trial Court concluded that if it found that the opinion was formulated outside of care and treatment that it was then not allowed by this Court's decision in *Hansen*. But that is not the holding of that case. The purpose of analyzing whether an opinion is formulated for care and treatment is to determine whether designation and disclosure is required. The Trial Court, having already concluded that there had been adequate disclosure and no surprise to the defense, was then required to follow the liberal rule relating to the admissibility of expert testimony. *Carolan v. Hill*, 553 N.W.2d 882, 888 (Iowa 1996) (" 'If… the Court is satisfied that the threshold requirements have been met, the witness should be allowed to testify' *"); State v. Rodriquez,* 636 N.W.2d 234, 245 (Iowa 2001) (" 'expert testimony is admissible if it is reliable and 'will assist the trier of fact in resolving an issue.'").

B. The McGrews preserved error on the exclusion of expert testimony

Defendants also argue that the McGrews failed to preserve error on the exclusion of expert testimony because they did not go far enough in their offer of proof. This argument is also meritless. As noted above, the Trial Court concluded on Trial Day #1 that the McGrews had fully disclosed the anticipated testimony of both experts. Where the court was uncertain and wanted additional information was how these individuals had formed their opinions, whether as part of care and treatment or not. Again, the court was erroneously focused on this distinction. Nevertheless, the McGrews provided the court with this information through an offer of proof thereby allowing the Trial Court to decide an issue that the Trial Court believed was necessary. This is reflected in the following statement by the court:

> I did indicate that I would allow the Plaintiffs to make an offer of proof in association with Bekavac's testimony, *including concerning why a determination by Bekavac as to whether or not the surgery was indicated by the original CTA was necessary in order for him to treat the Plaintiff. And I went on to say that if the Plaintiff can establish through Bekavac that forming these opinions about the indications for surgery was somehow necessary for treatment, I would consider allowing him to testify in that regard.*
>
> I anticipate that the offer of proof with Bekavac would also include an inquiry as to why he had Halloran review the original CTA and why that might be necessary to have the radiologist review that for purposes of treating Mr. McGrew post-surgery. And again, if a sufficient reason for this review by Halloran is shown to be necessary, I would consider allowing him to testify about his review of the original CTA. Otherwise, I do not intend to allow Halloran to testify on that subject.

(Trial Day #2, Tr. p. 5, L. 17 – p.6, L. 10) (Emphasis added).

By this point the Trial Court had already ruled that it saw no problem with disclosure. Therefore, its focus was on information that it needed to complete its ruling. The claim that the McGrews needed to go further to preserve error on this issue is unsupported by the record.

C. The claim that Defendants were left in the dark is wholly unsupported.

Defendants argue that the information made available before trial left them without a clear understanding of what these two local physicians were going to talk about. There is a reason that the Trial Court concluded that there had been no surprise. There is a reason that the Trial Court concluded that full disclosure had been made. That's because the McGrews went to great lengths to make certain that the Defendants understood that the McGrews were going to offer the testimony of these two local physicians as part of their case in chief. It began with several paragraphs in the Petition. (App. 7-8, ¶s 22-26). The McGrews then designated these two local physicians as experts and provided a description of what they were going to testify about. (App. 12-13). The McGrews provided the medical records from both local physicians which set forth their findings and conclusions. This included their qualifications. (App. 129-141). The McGrews provided answers to interrogatories specific to non-retained individuals (described as

treating physicians) which detailed who would be called, referenced their records, and provided an outline of their anticipated testimony including the fact that they would testify to standard of care and causation. (App. 145-147; 156-159). Finally, the McGrews arranged for the defendants to depose both local physicians. (App. 163-164). Despite making these arrangements, the defendants *chose to cancel those depositions,* opting to rely upon their legal argument that these individuals had not been properly disclosed. (App. 163). Yet, the defendants represented to the Trial Court that they were not given access to these physicians: "Well, heaven sakes, if he doesn't have access to them, I certainly don't." (Appellees' Brief, p. 42).

D. Iowa R. Civ. P. 1.500(2) is focused on fair notice and defendants were given fair notice of the potential testimony of the local physicians.

When the Supreme Court authorized the change to the rules regarding expert disclosures, it sought to create equivalencies in different experts.[1] It recognized that in some cases there will be expert witnesses that are not

[1] The changes were generally outlined in an August 28, 2014 order issued by the Supreme Court. The overall changes to the discovery process came in response to the Iowa Civil Justice Task Force report issued in 2012. *Reforming the Iowa Civil Justice System*: *Report of the Iowa Civil Justice Reform Task Force, January 30, 2012.* A review of the Task Force report reflects that the task force could not come to an agreement regarding changes to the expert disclosure requirement. *Id.* at pp. 39-*42*. It appears that the Supreme Court created this system on its own without a specific recommendation from the task force. The changes went into effect in 2015.

retained or specially employed for purposes of litigation. In creating the two separate subparagraphs of the rule, the court struck this equivalency by demanding different methods for disclosure. If you retain an expert, you can control that expert, and the expert provides the opinion in return for compensation, thereby making the expert a willing participant in the litigation. Therefore, it is reasonable to demand or expect an expert report prepared by that expert. On the other hand, if your case happens to have a witness that has special training and skill, you should be able to utilize that individual without demanding that he produce a written report that is the equivalent of what that expert may already have said in other writings. In other words, why should we expect a treating physician to prepare or sign an affidavit or report when that physician has already created the equivalent of such a report in the course of their professional responsibilities, including care and treatment of the patient? But the Supreme Court was also sensitive to the fact that the opposing party would need to know that the witness would be used as part of the case. Therefore, the Supreme Court created a separate but equal mechanism to an expert report from a non-retained expert that balanced these concerns.

Defendants' argument seeks to undermine the balance created by IRCP 1.500(2). In short, they are demanding an expert report from a non-

retained witness (e.g., a treating physician) even when their written report provides fair notice of their findings and conclusions. For example, in this case, when Dr. Bekavac writes in his progress note that "initially symptoms possibly related to amaurosis fugax, but 40% stenosis was not significant to justify endarterectomy in my opinion", he is stating both a factual basis and an opinion (conclusion) as to the appropriateness of the surgery. When a physician says that surgery is not justified, he is explicitly stating a standard of care opinion because no one would understand such an allegation to be something short of a violation of the standard of care. Any reasonable person reading that statement would understand that doing surgery that is not justified violates the standard of care. When provided to the defendants, who are trained in medicine, it is difficult to imagine a scenario where they do not understand that an unjustified surgery reflects an opinion as to the standard of care.

E. The exclusion of testimony of independent local physicians is inherently prejudicial

When an independent physician offers a written opinion that another physician in the same community has violated the standard of care, that is powerful evidence that should not escape the attention of a reasonable juror. But when the court prevents that testimony, then prejudice attaches.

The defense argues that the McGrews were allowed to argue evidence provided by Drs. Bekavac and Halloran and therefore no prejudice attached. However, there is a vast difference between stating a fact or finding and stating a conclusion, particularly when it comes from an independent witness with no obvious bias. The defense recognized this distinction when it sought to exclude any claim that Dr. Bekavac had criticized Dr. Otoadese and then argued to the jury in closing that Dr. Bekavac did not criticize Dr. Otoadese.

ISSUE II: EXCLUSION OF EVIDENCE OF BACKGROUND AND WORK HISTORY OF DR. OTOADESE

A. The distinction drawn by the defendants between evidence of the background of a party and evidence of the background of a retained expert is illogical.

Initially, Defendants argue that the McGrews waived the argument as to the use of Dr. Otoadese's loss of privileges to perform "open heart" surgeries. That is not true. The McGrews sought to introduce evidence of the loss of privileges, but the Court prevented that. The McGrews' position was laid out earlier in that dialogue:

> MR. DIAZ: Well, Your Honor, I think once Dr. Otoadese takes the stand, I think he puts into play his background and his qualifications. That includes two things that we focused on: One being the fact that he had lost his privileges to do open heart surgery which I think is part of C, and this issue of the fact that he was terminated from Cedar Valley Medical Specialists. It's just simply part of his background.

(Trial Day #5, p. 7, L. 16-23).

The comment on Trial Day #5, p. 11 reflected the fact that the Trial Court had already decided that the McGrews were not going to be allowed to use Dr. Otoadese's loss of privileges but would be allowed to offer evidence of the doctor's practice history without reference to the loss of privileges excluded by the Trial Court.

On the merits, Defendants contend that while expert witnesses can be asked about their professional history including loss of privileges and terminations from a practice, a party should not be subject to those inquiries. It argues that there is a greater danger of unfair prejudice to a party. But this argument is illogical. If the credentials, experiences, and qualifications of an expert witness are fair game, then why are not those same credentials, experiences, and qualifications of a party that takes the stand not fair game? In fact, the jury is instructed that expert witnesses are "persons who have become experts in a field because of their education and *experience"* and that the jurors have the right to accept or reject that expert testimony "considering the witness' education and experience, the reasons given for the opinion, and all other evidence in the case." (Jury Instruction No. 7 (Emphasis added)). How is a jury supposed to consider the witness' education and experience if we withhold relevant information about that individual's experience from the jury?

There is no doubt that the jury considered Dr. Otoadese to be an expert in his field. That's what the defense sought to do in their opening statement and in their direct examination of Dr. Otoadese; show him to be an expert in "cardiovascular surgery", the name of his medical clinic.

Defendants argue that these are collateral matters. However, the entire exercise of a jury trial in a medical negligence case is to determine the truth of what occurred in that particular case based on the education and training and experience of that particular physician, as all of that goes to the standard of care. The jury is instructed "a physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances" and that physicians who hold themselves out as specialists, such as Dr. Otoadese, "must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner." (Jury Instruction No. 10).

In essence, the jury's job is to compare what Dr. Otoadese claimed he did with what the retained experts for both sides claim that he is supposed to do. The suggestion that we should be less demanding of the physician that the jury is supposed to evaluate than the expert witnesses who are called to testify is illogical. If an expert witness can be cross-examined on the loss of

privileges pertinent to his specialty, and on the loss of employment related to his profession or specialty, then the same should be demanded of the defendant physician.

When Dr. Otoadese holds himself out to be a cardiovascular surgeon, as is reflected in the name of his wholly owned clinic, the loss of privileges of part of his practice is relevant to assessing the "degree of skill, care and learning" of this physician. And when Dr. Otoadese holds himself out to be a cardiovascular surgeon, the fact that he was terminated (in his own words "kicked out") from a previous clinic where he was doing cardiovascular surgery is relevant. It is not a collateral matter. It is at the heart of who he is as a physician and a jury needs to hear not only the things that make him appear to be a good expert, a good physician, and worthy of being trusted, but those things that make one question whether he has the requisite "degree of skill, care and learning" of a specialist. A defendant physician should not be allowed to withhold from the jury relevant facts that shed light on his background, work history and credibility as a physician, particularly when permitting other evidence that portrays him in a favorable light. The information sought to be introduced was directly relevant to his degree of skill, care and learning. These were not collateral matters.

Finally, Defendants argue that introduction of this information would lengthen the trial and require the Defendants to explain the information introduced. There is no evidence in the record as to how much longer this would have lengthened the trial. There is nothing in the record to indicate what the defendants would have done if the court would have allowed evidence relevant to the background, work history, and credibility of Dr. Otoadese. There was no dispute that he lost his privileges.[2] There is also no dispute that he was terminated from his employment. He could put on evidence as to both of these matters in an effort to explain the situation. But the Court's ruling prohibited the mention of any of this information and therefore there is no record to indicate exactly how much longer the trial would have lasted or what other restrictions the court could have placed once it decided to allow this evidence. Defendants' contention that there

[2] In his deposition, Dr. Otoadese denied that the hospital insisted he stop performing open-heart surgeries (App. 179). Yet, he claimed in his lawsuit that "unless he 'voluntarily' relinquished his privileges to perform open heart surgeries, his privileges to do so would be summarily suspended pursuant to the Hospital by laws." *See* ¶25 of his Petition and Jury Demand in *Otoadese v. Allen Memorial, et al,* LACV114625, Black Hawk County. Shuttleworth and Ingersoll represented Dr. Otoadese and prepared the Petition. The claim that the loss of privileges was not demanded by the Hospital is false. The matter was later settled but he continued to be denied privileges to perform open heart surgery.

would have been any meaningful change to the course of the trial is simply speculation.

The Trial Court erred in excluding information relevant to the "skill, care and learning" of Dr. Otoadese and in the process created a distorted perception of Dr. Otoadese, to the prejudice of the McGrews.

CONCLUSION

This Court should vacate the judgment and remand this case for a new trial.

Respectfully submitted,

/S/ Martin A. Diaz
Martin A. Diaz
1570 Shady Ct. NW
Swisher, IA 52338
Telephone: (319) 339-4350
Facsimile: (319) 339-4426
marty@martindiazlawfirm.com
Attorney for Appellants

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The undersigned certifies a copy of this Proof Brief was filed and served through the Electronic Document Management System on all counsel of record and the Clerk of Supreme Court.

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