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' PROOF BRIEF

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ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals for decision because it presents the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a medical negligence action arising from a claim of unnecessary surgery resulting in a catastrophic stroke to William McGrew. The fact that surgery was unnecessary was brought to the attention of the family by a local neurologist who stated his opinion that a review of a pre-surgery CT angiogram did not justify surgery. He then put this opinion in writing in a progress note to Mr. McGrew's chart. The local physician then sent the CT angiogram off to be over read by a local radiologist who confirmed the radiological findings did not justify surgery.

The Trial Court erroneously prohibited that local neurologist from testifying to his criticism of the decision to perform surgery and erroneously removed any mention of the criticism from the patient's chart. The Trial Court also prohibited the local radiologist from testifying as to his review of the CT angiogram and excluded his radiology report. Those decisions are at the heart of this appeal.

COURSE OF PROCEEDINGS: The McGrews filed a petition on July 29, 2016. (Petition) The suit named Dr. Otoadese, a Waterloo vascular surgeon and his corporation, and Dr. Driss Camoun, a Waterloo radiologist, as defendants. The petition identified the two local physicians whose opinions supported the claim that surgery performed by Dr. Otoadese was unnecessary. Further, the petition outlined the evidence to be provided by these two local physicians. (Petition, ¶s22-26).

On February 6, 2018, the McGrews filed their designation of experts. The designation included the local neurologist (Dr. Ivo Bekavac) and local radiologist (Dr. John Halloran). Further, the designation indicated that both local doctors would testify to the standard of care and any breach of the standard of care. (Plaintiffs' Designation of Experts).

Before trial began, the McGrews resolved their claim against Dr. Camoun. Trial against the remaining defendants began on February 26, 2019. Closing arguments were held on March 5, 2019. The jury returned a verdict in favor of the defendants on March 5, 2019. The court entered judgment in favor of the remaining defendants on March 7, 2019. (Entry of Judgment and Verdict Form). Later that same day, the McGrews filed a Motion for New Trial. (Plaintiffs' Motion for New Trial).

Thirty-six days later, on April 12, 2019, Dr. Otoadese signed his name to a "Statement of Charges and Settlement Agreement" with the Iowa Board of Medicine admitting to five counts of incompetence, one of them potentially being Mr. McGrew. (Plaintiffs' Supplement to Motion for New Trial). A week later, on April 19, 2019, the Iowa Board of Medicine issued a press release relating to these charges. (Plaintiffs' Supplement to Motion for New Trial). On April 22, 2019, the McGrews filed a supplement to their Motion for New Trial asserting that Dr. Otoadese had knowingly failed to disclose the existence of this investigation in responding to an interrogatory propounded to him. (Plaintiffs' Supplement to Motion for New Trial). Dr. Otoadese admitted that he had failed to disclose this investigation but argued that the motion was untimely as it had not been filed within fifteen days of the entry of judgment. (Resistance to Plaintiffs' Supplemental Motion for New Trial, p. 5).

On December 8, 2019, 9 months after the McGrews filed their Motion for New Trial and more than seven months after the McGrews filed their Supplemental Motion for New Trial, the Trial Court issued its ruling. The Trial Court denied the McGrews' motion for new trial filed on March 7, 2019 on the merits. The Trial Court denied the McGrews' motion to supplement for

lack of jurisdiction because it had been filed past the fifteen-day deadline. (Order on Post-Trial Motions).

The McGrews filed a Notice of Appeal on December 26, 2019. (Notice of Appeal).

STATEMENT OF THE FACTS[1]

In the summer of 2014, William McGrew began to experience occasional foggy vision in his left eye. (Petition, §5). On July 25, 2014, Mr. McGrew went to see an ophthalmologist, Dr. Richard Mauer, at the Mauer Eye Center who found that Mr. McGrew had a cataract that may explain his foggy vision. (Petition, §6). However, Dr. Mauer thought it appropriate to first rule out a vascular cause for his symptoms, so the doctor ordered a bilateral carotid duplex ultrasound. (Petition, §7). The carotid ultrasound was performed on August 6, 2014 and was interpreted by Dr. Mauer to show "mild carotid stenosis" of the arteries. (Petition, §8). Dr. Mauer then proceeded to schedule cataract surgery for Mr. McGrew for approximately August 20, 2014. (Petition, §9).

[1] The Statement of Facts do not focus on the evidence submitted to the jury, but rather on the facts relevant to the issues raised in the original Motion for New Trial and the Appeal. To the extent necessary to understand why the information excluded is relevant, evidence submitted to the jury is discussed.

In the interim, Mr. McGrew was referred by his primary care physician to Dr. Eromosele Otoadese to determine if the problem he was experiencing was due to a vascular condition. (Petition, §10). On August 18, 2014, Dr. Otoadese saw Mr. McGrew and ordered a CT angiogram. (Petition, §11). The CT angiogram was performed on August 18, 2014 and was interpreted by Dr. Driss Cammoun as showing 65% stenosis of the right internal carotid artery. (Petition, §12). Dr. Otoadese then read and interpreted the CT angiogram to show severe (at least 70%) stenosis of the right carotid artery. (Petition, §13). Dr. Otoadese was aware of the interpretation of the CT angiogram by Dr. Cammoun and relied upon it in deciding whether to recommend surgery. (Petition, §14). Dr. Otoadese then advised Mr. McGrew to cancel the cataract surgery and recommended a right carotid endarterectomy to remove plaque in that artery. (Petition, §15). Based on the recommendation made by Dr. Otoadese, Mr. McGrew agreed to undergo a right carotid endarterectomy. (Petition, §16).

The surgery was performed by Dr. Otoadese on September 2, 2014. (Petition, §17). The morning following the procedure, Mr. McGrew awoke with a facial droop and weakness on his left side. (Petition, §18). An MRI was performed which showed a stroke on the right side of the brain. (Petition, §19).

Dr. Otoadese then returned Mr. McGrew to the operating room in an effort to re-vascularize the area, but that effort was not successful. (Petition, §20). The stroke suffered by Mr. McGrew was a direct result of the surgical procedure recommended and performed by Dr. Otoadese. (Petition, §21).

On September 26, 2014, Mr. McGrew was seen by Dr. Ivo Bekavac, a Waterloo neurologist, for a second opinion regarding his condition. (Petition, §22). Dr. Bekavac, who has special training in interpreting imaging related to carotid arteries, examined Mr. McGrew and reviewed the pre-surgery imaging, and concluded that there was insufficient pre-surgery carotid stenosis to justify the September 2, 2014 surgery. (Petition, §23). Dr. Bekavac also concluded that the second surgery was not indicated as the symptoms of the stroke had occurred more than 8 hours before. (Petition, §24).

Dr. Bekavac then sent the imaging studies to Dr. John Halloran, a Waterloo diagnostic radiologist, and asked him to review them to determine whether he concurred with Dr. Bekavac's interpretation of the imaging studies. (Petition, §25). Dr. Halloran's review of the pre-surgery imaging confirmed Dr. Bekavac's conclusion that there was not sufficient evidence to justify the recommendation and performance of the September 2, 2014 surgery. (Petition, §26).

The McGrews alleged that the surgery of September 2, 2014 was an unnecessary surgical procedure that placed Mr. McGrew at substantial risk for the stroke that he eventually developed. (Petition, §27). The interpretation of the pre-surgery imaging studies by Dr. Cammoun and Dr. Otoadese was incorrect, and the decision to recommend surgery by Dr. Otoadese was also wrong. (Petition, §28).

On February 6, 2018, the McGrews filed their Designation of Experts. The designation included the local neurologist (Dr. Ivo Bekavac) and local radiologist (Dr. John Halloran). Further, the designation indicated that both local doctors would testify to the standard of care and any breach of the standard of care. (Plaintiffs' Designation of Experts, ¶¶2-3).

Dr. Otoadese testified in a pre-trial deposition that in 2008-2009 he "voluntarily" surrendered his hospital privileges to perform heart surgery, which at the time constituted 50-60% of his overall time performing surgeries. Dr. Otoadese then filed suit against Allen Memorial Hospital relating to these surrendered privileges and reached a confidential settlement. But, notwithstanding that settlement, Dr. Otoadese has not performed "open heart" surgeries since 2009. He has admitted that at the time he was performing "open heart" surgeries, they constituted 50-60% of his surgery time and

approximately 30% of his overall surgeries. (Deposition of Dr. Otoadese, p. 15, L. 16 - p. 19, L. 21).

In 2012, Dr. Otoadese was "kicked out" (terminated) from Cedar Valley Medical Specialists and on January 1, 2013 he opened Northern Iowa Cardiovascular and Thoracic Surgery Clinic, P.C. In the summer of 2014, Dr. Otoadese's surgeries were limited to vascular and nonvascular thoracic areas of the body and he was still not performing open-heart procedures---consistent with the fact that he no longer had privileges to perform open heart surgeries. (Deposition of Dr. Otoadese, p. 12, L. 25 - p. 14, L. 17).

Prior to trial, on February 12, 2019, Dr. Otoadese filed a motion in limine seeking, among other requests, to exclude the testimony of Dr. Bekavac and Dr. Halloran, and to exclude Dr. Otaodese's prior history of problems with Allen Memorial Hospital and Cedar Valley Medical Specialists. (Defendants' Motion in Limine, §3 and §4). The McGrews resisted both these requests on February 14, 2019. The resistance included all documentation establishing that the McGrews had fully disclosed to Dr. Otoadese that Drs. Bekavac and Halloran would offer testimony regarding the standard of care and causation. (Plaintiffs' Resistance to Defendant Otoadese's Motion in Limine, pp. 6-21).

On the first day of trial, February 26, 2019, the Trial Court provided a preliminary ruling that, despite acknowledging full and complete disclosure of standard of care opinions by Drs. Bekavac and Halloran, these doctors would be prohibited from rendering standard of care or causation opinions. (Trial Day #1, Tr. p. 9, L. 1 - p. 20, L. 12; Tr. p. 32, L. 3 - p. 49, L. 23). The court, in a colloquy with counsel stated on at least two occasions that the McGrews had fully disclosed their intent to have these two local physicians comment on the standard of care and causation:

> 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.
>
> ***
>
> MR. DIAZ: Your Honor, I think I'm back to the -- if I may, I'm back to the whole point that now she's talking about we didn't give disclosure again.
>
> THE COURT: Okay. I'm not so hung up on the disclosure at this point. Actually, I have never been hung up on the disclosure, per se, all right, even though I talked about specially employed. When I talk about specially employed, it more was the difference -- kind of the old notion of treating physician and expert. Okay?
>
> MR. DIAZ: All right.
>
> THE COURT: 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. I think that if there's surprise, it's the cutting of what Dr. Bekavac said.

(Trial Day #1, Tr. p. 41, L. 10 – p. 14; Tr. p. 45, L. 24 – p. 46, L. 14).

The Trial Court wanted additional time to review the matter and offered to provide a ruling later that evening.

The following morning, February 27, 2019, the court entered its ruling that it had outlined in an email the night before. (Trial Day #2, Tr. p. 4, L. 4 - p. 8, L. 7). The Trial Court's ruling prevented the McGrews from offering any standard of care testimony by Dr. Bekavac including any criticisms of Dr. Otoadese. It also ordered the redaction of that part of Dr. Bekavac's progress note for September 26, 2014 that criticized the performance of the surgery. It allowed him to disclose the amount of stenosis found by Dr. Halloran on his over read of the CT angiogram. (Trial Day #2, Tr. p. 4, L. 4 -p. 8, L. 7; Plaintiff's Exhibit 11). The Trial Court went on to prohibit Dr. Halloran from testifying at all. (Trial Day #3, Tr. p. 4, L. 4 – p. 20, L. 17). The McGrews were given the opportunity to make an offer of proof with regard to the nature of the relationship between Dr. Bekavac and Mr. McGrew, the issue at the heart of the Court's ruling, and to place into the record the unredacted progress note of September 26, 2014. (Trial Day #2, Tr. p. 94, L. 7 – p. 121, L. 18; Court Exhibit 1).

After that offer of proof, the parties argued the question of whether Dr. Bekavac or Dr. Halloran would be permitted to offer any standard of care or

causation opinions. (Trial Day #2, Tr. p. 122, L. 6 – p. 139, L. 15). The court then issued its ruling as follows:

> THE COURT: …this offer of proof did give me some clarity by being able to hear and see Dr. Bekavac and know how he's gonna testify about what his own manner of conduct tends to be in dealing with clients, dealing with patients. And what it leads me to is this: I continue to believe that his own review of the test results and his own opinion concerning the 40 percent stenosis is admissible. He can testify to that. And given what he testified to about the fact that when he sees something like that and it's different than what he has seen stated by someone else, that he will, from time to time, seek the opinion of someone else, I believe that -- and therefore, that's -- he sent to Halloran, asked for Halloran's opinion, I think that Halloran's opinion of the 32 percent is also admissible. However, I do not believe that Dr. Bekavac's opinion solicited by the patient about whether or not the surgery itself was indicated or not indicated which, to me, goes specifically to the standard of care issue, I do not believe that that's admissible, first surgery or second surgery.
>
> So to the extent that we're parsing out the two things, that's how I intend to parse them out, and that's how I think it falls on whether or not what represents standard of care versus what represents what this doctor wanted to know in his thorough review and in preparation for treating his client.

(Trial Day #2, Tr. 125, L. 7 – p. 126, L. 6). The court also prohibited Dr. Halloran from testifying at all. (Trial Day #2, Tr. 127, L. 7 – p. 129, L. 19).

Th following day, February 28, 2019, the Court permitted the McGrews to make an offer of proof with regard to the nature of the relationship between Dr. Halloran and Mr. McGrew, the issue at the heart of the court's previous ruling, and to place into the record the unredacted radiology report prepared

by Dr. Halloran with regard to his review of the CT angiogram. (Trial Day #3, Tr. 6, L. 1 – 16, L. 6; Court Exhibit #2).

On the fifth day of trial, March 4, 2019, the court took up Dr. Otoadese's motion in limine with regard to his qualifications and credibility. The motion was taken up shortly before Dr. Otoadese testified. The McGrews sought to cross-examine Dr. Otoadese regarding his qualifications, practice history and credibility, including the fact that Dr. Otoadese was not permitted to perform open heart surgeries at Allen Memorial Hospital, and that he had been terminated (kicked out) of Cedar Valley Medical Specialists. The court granted the motion in limine and prohibited any mention of either subject during the cross-examination of Dr. Otoadese. (Trial Day #5, Tr. p. 3, L. 4 – p. 12, L. 22).

Later that day, the McGrews requested that they be given the opportunity to call Dr. Halloran as a rebuttal witness to the testimony offered by Dr. Otoadese's experts regarding their review of the CT angiogram. This request was rejected. (Trial Day #5, Tr. 149, L. 9 – p. 155, L. 17).

Shortly after that, Dr. Otoadese moved the court for an "order that Plaintiffs' counsel not be allowed to argue that… Dr. Bekavac criticized Dr. Otoadese." (Trial Day #5, Tr. 170, L. 15-18). Dr. Otoadese argued that because the McGrews had been prohibited from offering any standard of care

testimony by the court's previous order "Dr. Bekavac did not criticize Dr. Tony in any of his testimony." The Trial Court granted the motion and the McGrews were prohibited from arguing that Dr. Bekavac had been critical of the care provided by Dr. Otoadese. (Trial Day #5, Tr. 170, L. 15 – p. 173, L. 15).

APPEAL ARGUMENT

I. IN EXCLUDING THE TRIAL TESTIMONY OF DR. IVO BEKAVAC, THE TRIAL COURT MISUNDERSTOOD AND THEREFORE MISAPPLIED THE LAW ON ADMISSIBILITY OF EXPERT TESTIMONY.

Preservation of Error. The McGrews resisted Dr. Otoadese's Motion in Limine to exclude the testimony and progress note prepared by Dr. Bekavac. The McGrews objected on the record during the trial to the Trial Court's proposed and final decision to exclude the testimony and progress note prepared by Dr. Bekavac. See Iowa R. Evid. 5.103(a)(2). The McGrews filed a timely Motion for New Trial on March 7, 2019 raising the Trial Court's decision to exclude the trial testimony and progress note prepared by Dr. Bekavac as error. The McGrews have preserved error for review.

Standard of Review. The standard of review is a mixture of error at law and abuse of discretion. It is an error of law to misunderstand or misapply the applicable law. *Dougherty v. Boyken*, 155 N.W.2d 488, 491 (Iowa 1968)

("The discretion exercised by the trial court must be a legal one based on sound judicial reasons. 'Abuse of discretion' means simply no discretion to do what was done."). However, the ultimate standard of review for a decision to exclude expert testimony is for abuse of discretion. *Hansen v. Cent. Iowa Hosp. Corp*., 686 N.W.2d 476, 479-80 (Iowa 2004) ("To the extent that we are required to interpret Iowa Code section 668.11, our review is for correction of errors at law. On the question of whether the district court properly exercised its discretion in excluding [expert] testimony, our review is for abuse of discretion.").

The standard of review for the admission of an exhibit is for abuse of discretion. *Brooks v. Holtz*, 661 N.W.2d 526, 532 (Iowa 2003) (" 'Submission of exhibits to the jury is a matter resting in [the] trial court's discretion.'…We will not upset a trial court's discretionary decision unless the court exercises its discretion 'to an extent clearly unreasonable' or rests its decision on untenable grounds.").

Merits.

A. Applicable Law:[2] To establish a prima facie case of medical negligence, a plaintiff must produce evidence that:

[2] *Hansen v. Cent. Iowa Hosp. Corp*., 686 N.W.2d 476 (Iowa 2004) will be discussed in detail in the next sections.

(1) establishes the applicable standard of care;

(2) demonstrates a violation of this standard; and

(3) develops a causal relationship between the violation and the injury sustained.

Kennis v. Mercy Hosp. Medical Center, 491 N.W.2d 161, 165 (Iowa 1992).

"A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances. A violation of this duty is negligence." *Iowa Civil Jury Instruction 1600.2.*

*"*Physicians who hold themselves out as specialists 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. A violation of this duty is negligence." *Iowa Civil Jury Instruction* 1600.3.

"In a medical negligence case such as this, expert testimony is required to establish the standard of care and a breach thereof." *Schroeder v. Albaghdadi*, 744 N.W.2d 651, 656 (Iowa 2008). Further, identification or certification of expert witnesses in a medical negligence case is governed by Iowa Code §668.11 which provides in relevant part:

> 1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other

> parties the expert's name, qualifications and the purpose for calling the expert….
>
> 2. If a party fails to disclose an expert pursuant to subsection 1 or does not make the expert available for discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown.

Once properly designated, the Iowa Rules of Civil Procedure then require a party to disclose those facts and opinions to be offered by an expert witness. Iowa R. Civ. P. 1.500(2). The form of disclosure is dependent upon whether the witness was retained or specially employed for litigation. If so, Iowa R. Civ. P. 1.500(2)(b) applies and the expert is required to provide a written report outlined in the rule. If not, Iowa R. Civ. P. 1.500(2)(c) applies, and the expert is not required to provide a written report but the party calling the expert is required to disclose "a summary of the facts and opinions to which the witness is expected to testify." Iowa R. Civ. P. 1.500(2)(c)(2).

Once properly designated and opinions disclosed, an expert's testimony is governed by Iowa R. Evid. 5.702 which provides that "a witness who is qualified as an expert… 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."

In a medical negligence cases, there is a specific statute that outlines the qualifications of an expert. The relevant version of Iowa Code §147.139[3] provides as follows:

> If the standard of care given by a physician….is at issue, the court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the person's medical…qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case.

This Court, in *Carolan v. Hill*, 553 N.W.2d 882, 888 (Iowa 1996) stated the following principles with regard to expert testimony:

> We are committed to a liberal rule on admissibility of expert testimony, and the admission of such testimony rests within the sound discretion of the district court. Iowa Rule of Evidence [5.702] has "codified Iowa's existing liberal rule on the admission of opinion testimony." … Further, in its comments to rule [5.702], the advisory committee stated:
>
> > *If* [pursuant to Iowa Rule of Evidence 104(a)] *the Court is satisfied that the threshold requirements have been met, the witness should be allowed to testify.* All further inquiry regarding the extent of his [or her] qualifications go to the weight that the fact finder can give such testimony under Rule 104(e).

(Italics in original)

"Exclusion of an expert as a witness is the most severe sanction and should not be imposed lightly. . .." *Lambert v. Sisters of Mercy Health*

[3] The statute was amended after this case was filed but that amendment does not apply to this case.

Corp., 369 N.W.2d 417, 421 (Iowa 1985)[4] The Court in *Lambert* made the following pronouncement applicable to this situation:

> Rule 125 [now 1.508] requires supplementation by giving the names of experts to be called at trial. Failure to comply with the rule may result in sanctions, which are implicit in the rule. *Exclusion of an expert as a witness is the most severe sanction and should not be imposed lightly; other sanctions are available such as a continuation of the trial or limitation of testimony.* As the Minnesota Supreme Court stated in *Cornfeldt v. Tongen, 262 N.W.2d 684, 697 (Minn. 1977), "We caution trial courts from readily excluding expert testimony in malpractice cases for inadvertent failure to disclose that testimony during discovery. Exclusion is justified only when prejudice would result."*

Lambert at 421 (emphasis added).

B. Trial Court's Ruling: Initially, and most importantly, the Trial Court found that the McGrews properly designated Dr. Bekavac and Dr. Halloran in their designation of experts and appropriately disclosed their proposed testimony as required by Iowa R. Civ. P. 1.500(2). The Court made this finding on three occasions during trial. (Trial Day #1, Tr. p. 41, L. 10 – p. 14; Tr. p. 45, L. 24 – p. 46, L. 14; Trial Day #2, p. 7, L. 15-18). This finding is supported by the McGrews' designation of experts filed on February 6, 2018. (Plaintiffs' Designation of Experts). It is also supported by the McGrews'

[4] This same principle was cited by Dr. Otoadese in a pretrial pleading resisting the McGrews' effort to strike one of Dr. Otoadese's expert for failure to make him available for a deposition. (Defendants' Resistance to Plaintiffs' Motion to Strike, 1.21.2019, p. 2).

disclosures set forth in its resistance to Dr. Otoadese's motion in limine. (Plaintiffs' Resistance to Defendant Otoadese's Motion in Limine, pp. 6-14).

In its ruling on the Motion for New Trial, the court incorporated its findings and conclusions made during the trial:

> During the course of trial, the Court allowed an offer of proof with regard to each of the two treating physicians at issue, conducted extensive hearings with the parties concerning the potential admissibility of the opinions sought by the Plaintiffs, and also issued a formal ruling on the record concerning the admissibility of the expected testimony of these witnesses. This ruling included the Court's analysis and application of the *Hansen* [*v. Cent. Iowa Hosp. Corp*., 686 N.W.2d 476 (Iowa 2004)] decision to the issue during the course of trial. This Court relies on and incorporates the ruling made by the Court during the course of trial concerning the issue of the testimonies of Dr. Bekavac and Dr. Halloran.

(Order on Post-Trial Motions, p. 3)

The Trial Court's ruling during trial was premised on Dr. Bekavac's status as a treating physician and interpreted this Court's decision in *Hansen v. Cent. Iowa Hosp. Corp*. to prohibit standard of care opinions by treating physicians, even if properly designated and disclosed, unless the standard of care opinions were a necessary part of providing care and treatment. This is reflected in the Trial Court's comments on the record:

> 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.

***

My email to them went on to indicate that for purposes of ruling, I had reviewed the pertinent case law, including the *Hansen* case, the Code of Iowa, and Rules of Civil Procedure. I note that Bekavac and Halloran were identified in the 668.11 designation as treating physicians who might testify about the standard of care, but I went on to note that the case law of Iowa does put limits on the ability of a treating physician to discuss standard of care and causation issues and that the *Hansen* case is still being cited by our appellate courts fairly recently within the last year as valid authority. I went on to note that although we had discussions yesterday about whether or not this was a disclosure or discovery issue, now that I've taken the time to view the file more closely, I do not believe that there is a disclosure issue. Again, these two individuals were designated as part of 668.11 notice, and I don't think they were subject to a written report under Rule of Civil Procedure 1.500(2)(b). And I also went on to reference that I was relying upon case law language that a treating physician cannot testify as to standard of care or causation when those issues were not necessary for the physician to formulate an opinion to care for the patient.

(Trial Day #2, Tr. p. 5, L. 17 – p. 7, L. 7).

C. The Trial Court Misinterpreted and Misapplied *Hansen.*

Despite concluding that the McGrews had fully disclosed the potential testimony of Drs. Bekavac and Halloran, the Trial Court ruled that these two fully disclosed expert witnesses would not be permitted to testify to their

fully disclosed opinions. The Trial Court was erroneously focused on their status as treating care providers rather than the fact that they had been fully disclosed as expert witnesses.

The Trial Court determined that Dr. Bekavac would be permitted to testify to that information that would be expected to be offered by a treating physician but would not be permitted to testify to an opinion as to the standard of care because he was a treating physician. However, the court overlooked the fact that even treating care physicians can testify to the standard of care so long as they have been appropriately designated as experts and their expected opinions had been disclosed to the defense. That is the holding of *Hansen.*

There is nothing in *Hansen* that permits the court to strike a properly designated expert witness or to prohibit an expert witness from testifying to fully disclosed opinions. Even if the Trial Court correctly determined that Drs. Bekavac and Halloran were not treating physicians at any point in time, or for any specific opinion, *Hansen* does not provide support for the proposition that the Trial Court can prevent these experts from testifying.

These were expert witnesses who had been disclosed to the defendant. In *Hansen*, the Court recognized that "Nothing in [IRCP 125, now 1.508] shall be construed to preclude a witness from testifying as to (1) knowledge

of the facts obtained by the witness prior to being retained as an expert or (2) mental impressions or opinions formed by the witness which are based on such knowledge." *Hansen* at 481 (citing to *Day v. McIlrath,* 469 N.W.2d 676 (Iowa 1991*)* and then Iowa R. Civ. P. 125).

Both Drs. Bekavac and Halloran gained knowledge of the facts and formulated opinions before the McGrews retained counsel and filed suit, and well before they were disclosed as expert witnesses. In fact, neither of them were retained as an expert witness. They were called as non-retained expert witnesses. The fact that the court determined that neither of the opinions that they held were part of the care and treatment of a patient is wholly irrelevant. It is not part of the analysis of a fully disclosed expert witness. It may well have relevance in a setting in which there has not been full disclosure; in that setting whether the individual was treating or was specially employed or was a retained witness may be instrumental in determining whether a person can testify. But here, where the Trial Court acknowledged full disclosure under both Iowa Code §668.11 and Iowa R. Civ. P. 1.500(2), the court was mistaken to have prohibited this testimony. This was an error of law and since that error of law is the basis for the court's discretionary decision to exclude the witnesses, it amounts to an abuse of discretion. *Hansen* at 484 ("we agree with Marlys that Dr. Pollack's

causation opinion was not within the ambit of section 668.11. The district court therefore abused its discretion in not admitting the offer of proof on that ground."). See also *Dougherty v. Boyken,* 155 N.W.2d 488, 491 (Iowa 1968).

In *Hansen*, the "district court disallowed testimony from [plaintiff's] treating physician because the Hansens did not designate him as an expert pursuant to Iowa Code section 668.11 (2003)." *Hansen* at 476. The Supreme Court posed the following questions on further review:

> [W]e consider two issues. First, did the district court abuse its discretion when it excluded the testimony of a treating physician on the question of causation? Second, if so, did such denial deprive the Hansens of a fair trial thereby entitling them to a new trial?

Hansen at 479.

The Supreme Court noted the following regarding expert disclosure:

> It is uncontroverted that the Hansens did not designate Dr. Pollack as their expert on causation within one hundred eighty days of IMMC's answer and offered no good cause to extend the time. The Hansens contend they were not required to do this because Dr. Pollack formulated all of his opinions about causation during his treatment of Marlys and not in anticipation of litigation. As such, the Hansens argue, Dr. Pollack's testimony on causation clearly falls within this court's interpretation of *section 668.11* as stated in *Carson v. Webb, 486 N.W.2d 278 (Iowa 1992).*

Hansen at 480.

In reversing the district court, this Court found that the plaintiffs were not required to designate this treating physician because the treating

physician's opinions were formulated in the course of medical treatment, and not as a retained expert:

> From the foregoing deposition testimony, it is clear that Dr. Pollack was Marlys's treating physician long before the fall at IMMC and after the fall. It is also clear from the offer of proof that he formed his causation opinion as a *treater*. Moreover, there is no record evidence that Dr. Pollack's causation opinion was formulated as a retained expert for purposes of issues in pending or anticipated litigation.
>
> Dr. Pollack treated Marlys for the increased pain following the fall in question with various procedures and increased medication. Therefore, his causation opinion directly related to his treatment. Because Dr. Pollack was treating Marlys for this increased pain, it is only reasonable that the jury should hear what the doctor thought was the cause of that increased pain.
>
> For all these reasons, we agree with Marlys that Dr. Pollack's causation opinion was not within the ambit of *section 668.11*. The district court therefore abused its discretion in not admitting the offer of proof on that ground.

Hansen at 484.

It is crystal clear from *Hansen* that the determination *whether disclosure was required under Iowa code section 668.11* was dependent on whether the physician's testimony "was formulated as a retained expert for purposes of issues in pending or anticipated litigation." There is nothing in *Hansen* that supports the exclusion of witness testimony because it was not part of the care and treatment of the plaintiff. At best, any conclusion by the Trial Court that the proposed testimony was not formulated as a treating physician would lead to the requirement that plaintiff disclose the individual

under Iowa Code §668.11. Since plaintiff complied with that statute and further complied with the disclosure rules of Iowa R. Civ. P. 1.500(2), there was no basis for the court to exclude the testimony.

In effect, the analysis used by the Trial Court would lead to the exclusion of all treating care physician testimony that was not part of the care and treatment of the individual. The McGrews would never be able to utilize treating care providers to establish the standard of care or to provide opinions regarding whether care was appropriate or not, even in the situation presented here where the McGrews specifically designated the treating physicians under the applicable statute and then disclosed proposed opinions during the course of discovery.

Finally, the Trial Court noted that *Hansen* was still good law as "it is still being cited had been recently cited by our appellate courts fairly recently within the last year as valid authority." (Trial Day #2, p. 7, L. 9-11). Presumably, the court was referencing *Sherrick* v. *Obstetrics* & *Gynecology Specialists, P.C.*, 2018 Iowa App. LEXIS 1005 (Iowa Ct. App. 2018) and *Stellmach* v. *State*, 2017 Iowa App. LEXIS 416 (Iowa Ct. App. 2017).

However, these cases do not support the Trial Court's analysis; rather they support the McGrews' position. In *Sherrick*, the plaintiff argued that the trial court erred in not permitting a treating physician to testify to the

standard of care for performing ultrasounds. However, the Court of Appeals stated that "Dr. Hardy-Fairbanks treated Sherrick at UIHC, but Sherrick did not certify her as an expert witness under Iowa Code section 668.11." *Id* at *8.

The Court of Appeals concluded as follows:

> The treating physician's opinion on the standard of care was expert testimony, **and thus improper absent compliance with the required disclosures**. …*see also* 8 Tom Riley & Peter C. Riley, *Iowa Practice Series: Civil Litigation Handbook* § 9:6 (2018) ("Had the treating physician opined as to the standard of care of a [d]efendant, he would have to be designated under § 668.11 since such an opinion would not have been included in his care of the [p]laintiff."). The district court did not abuse its discretion in excluding one sentence from the deposition of Dr. Hardy-Fairbanks.

Sherrick at *10 (emphasis added)

In *Stellmach,* the Court of Appeals stated:

> UIHC also argues it was exempt from the supplementation requirement of rule 1.508(3) because Dr. Gantz was not an expert retained in anticipation of litigation. However, when a treating physician "assumes a role in litigation analogous to the role of a retained expert," **supplemental discovery may become obligatory**. *Day v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991); *see also Carson v. Webb*, 486 N.W.2d 278, 280-81 (Iowa 1992). Here, UIHC used Dr. Gantz and his newly-formed opinions on causation in a manner analogous to a retained expert—without identifying him as its expert and without supplementing its responses to interrogatories. We do not agree with UIHC that it is excused from an obligation to supplement its responses to interrogatories because Dr. Gantz was the Stellmachs' named expert under these circumstances. Dr. Gantz formed his new opinion well after he was no longer treating Tamara Stellmach. It is also not disputed that UIHC counsel were aware of Dr. Gantz's changed opinion on the material issue of causation prior to trial. The

> fact that the Stellmachs could have re-deposed Dr. Gantz prior to trial or contacted him to see if he had a changed opinion is not of consequence in determining if UIHC complied with its duties to supplement discovery responses.

Stellmach at 27-28 (emphasis added)

Stellmach supports the McGrews' position because, once again, the focus is on whether disclosure was made. Since the Trial Court found that adequate disclosure was made, there was no basis for this court to have excluded this testimony. Even Dr. Otoadese cited these two cases for the proposition that treating care physicians can be excluded from testifying beyond their care and treatment *if the plaintiff fails to adequately disclose such testimony*. (Defendants' Motion in Limine, p. 14).

The Trial Court misinterpreted the caselaw on when non-retained witnesses (whether described as treating physicians) can offer opinions regarding the standard of care. The caselaw only prohibits these types of witnesses from offering standard of care opinions when the witnesses have not been properly designated, or their opinions were not disclosed. Here, they were designated and disclosed. Accordingly, it was error to have excluded Dr. Bekavac from offering opinions as to the standard of care and breach of the standard of care.

D. The McGrews were prejudiced by the Trial Court's exclusion of Dr. Bekavac's opinions and progress note.

The evidence excluded was crucial to the McGrews' claim. It was important for the jury to hear that Dr. Bekavac was critical of the decision to perform surgery on Mr. McGrew. The fact that defense sought the Trial Court's ruling excluding such evidence provides support to its importance. But so is the fact that Dr. Otoadese successfully convinced the Trial Court to prohibit the McGrews' counsel from using the word criticism in closing arguments. (Trial Day #5, Tr. 170-173).

Dr. Otoadese may counter by claiming that there was no harm to the McGrews because they were able to put on evidence of standard of care and the breach of the standard of care through their retained expert. Dr. Otoadese exploited the Trial Court's ruling and sought to paint the McGrew's retained expert, Dr. Carl Adams, from Colorado, as untrustworthy because he is paid to testify:

> Dr. Adams was very confident and certain about his opinions, and as I've said, I think there's a lot of reason to be skeptical. Skeptical of a doctor who makes a hundred and twenty-five to a hundred and fifty thousand dollars a year doing exactly what he was doing in this courtroom, reviewed more than 5,000 cases.

(Trial Day #6, Tr. p. 60, L. 1-6).

On the other hand, Dr. Bekavac did not have an ulterior motive, such as compensation. Dr. Bekavac was a colleague and friend of Dr. Otoadese, practicing in the same community. (Trial Day #2, Tr. p. 117, L. 4-10).

In addition to the lack of bias, the exclusion of Dr. Bekavac's criticisms also permitted the defense to undermine the testimony of Dr. Adams, as reflected in the following closing argument made by Counsel for Dr. Otoadese:

> So when you start with credibility, I think you have a reason to look very closely and think very hard about what you actually find to be credible from that witness stand. ***Dr. Adams is the source of the claims in this case. You've heard a lot about Dr. Bekavac, but in fairness, folks, the criticisms of Dr. Otoadese don't come from Dr. Bekavac. They come from Dr. Adams.*** And so I ask you to think carefully about what he said and how credible you find it when you compare it to evidence you've heard from other doctors.

(Trial Day #6, Tr. p. 48, L. 18 – p. 49, L.2) (Emphasis added).

The Court's ruling distorted the trial, and the defense, after having convinced the Trial Court to exclude Dr. Bekavac's criticism of Dr. Otoadese, had the gall to tell the jury that "t*he criticisms of Dr. Otoadese don't come from Dr. Bekavac"*. This distortion is a direct product of the Trial Court's decision to exclude the jury from hearing the truth. It allowed Dr. Otoadese to portray a version of the facts that was not accurate---a false narrative. Dr. Bekavac had criticized Dr. Otoadese ---it's plainly visible in his progress note of September 26, 2014:

> 1. The patient suffered right hemispheric embolic infarct after endarterectomy and occlusion of right internal carotid artery. **Initially symptoms possibly related to amaurosis fugax, but 40% of stenosis was not significant to justify endarterectomy in my opinion.**
> **2. In my opinion second endarterectomy probably was not indicated particularly being done after almost eight hours after the new onset of symptoms.**

(Court Exhibit 1) (emphasis added to redacted information; compare Plaintiff Exhibit 11(redacted) with Court Exhibit 1 (unredacted))

Dr. Bekavac is a neurologist who commonly cares and treats individuals with stroke and provides an assessment of whether the individual is a candidate for carotid endarterectomy. (Trial Day #2, Tr. p. 100, L. 10-24; Plaintiff Exh. 11A). Dr. Bekavac is also "certified by Neuroimaging Subspecialty Board since 2013 which proves my competency in reading neuroimaging studies." (Trial Day #2, Tr. 95, L. 1-25). Dr. Otoadese offered Dr. Gebel, also a neurologist, to discuss the standard of care relating to Dr. Otoadese. (Trial Day #4, Tr. p. 91, L. 20-21; Tr. p. 124, L. 2-24). Dr. Bekavac is the equivalent of Dr. Gebel and was therefore qualified to comment on the standard of care in assessing a patient for carotid endarterectomy.

Dr. Bekavac should have been permitted to testify to his opinions formed at the time that he wrote that note, that surgery on Mr. McGrew was not justified and to explain his opinion. His progress note, a medical record,

should also have been admitted into evidence without redaction pursuant to Iowa R. Evid. 5.803(4) or 5.803(6). The McGrews laid proper foundation for the introduction of this progress note during the offer of proof. (Trial Day #2, Tr. 105, L. 7 – p.106, L. 13).

The court found that the McGrews fully complied with the disclosure requirement. There is no legal or discretionary support for the exclusion of expert testimony by Dr. Bekavac. The Court's decision to prohibit Dr. Bekavac, a local physician and friend of defendant, from testifying to the standard of care criticism set forth in his September 26, 2014 record, when he was properly designated and his opinions fully disclosed, is reversible error.

II. IN EXCLUDING THE TRIAL TESTIMONY OF DR. JOHN HALLORAN, THE TRIAL COURT MISUNDERSTOOD AND THEREFORE MISAPPLIED THE LAW ON ADMISSIBILITY OF EXPERT TESTIMONY.

Preservation of Error. The McGrews resisted Dr. Otoadese's Motion in Limine to exclude the testimony and radiology report prepared by Dr. Halloran. The McGrews objected on the record on a number of occasions during the trial to the Trial Court's proposed and final decision to exclude the testimony and radiology report prepared by Dr. Halloran. See Iowa R. Evid. 5.103(a)(2). The McGrews filed a timely Motion for New Trial on March 7, 2019 raising the Trial Court's decision to exclude the trial

testimony radiology report prepared by Dr. Halloran as error. The McGrews have preserved error for review.

Standard of Review. The standard of review is a mixture of error at law and abuse of discretion. It is an error of law to misunderstand or misapply the applicable law. *Dougherty v. Boyken*, 155 N.W.2d 488, 491 (Iowa 1968) ("The discretion exercised by the trial court must be a legal one based on sound judicial reasons. 'Abuse of discretion' means simply no discretion to do what was done."). However, the ultimate standard of review for a decision to exclude expert testimony is for abuse of discretion. *Hansen v. Cent. Iowa Hosp. Corp*., 686 N.W.2d 476, 479-80 (Iowa 2004) ("To the extent that we are required to interpret Iowa Code section 668.11, our review is for correction of errors at law. On the question of whether the district court properly exercised its discretion in excluding [expert] testimony, our review is for abuse of discretion.").

Merits.

A. Applicable Law: The applicable law is the same as in Section I above.

B. Trial Court's Ruling: Please refer back to the same discussion in Section I above. Dr. Halloran was properly designated as an expert witness and his proposed opinions were disclosed.

C. The Trial Court Misinterpreted and Misapplied *Hansen*. Please refer back to the same discussion in Section I above. Having been properly designated and his opinions disclosed, there was no legal basis to prohibit Dr. Halloran from testifying as to his review of the CT Angiogram and his findings and conclusions from that review. Because the Trial Court misinterpreted and misapplied the law on admissibility of expert testimony, the Trial Court abused its discretion.

D. The McGrews were prejudiced by the Trial Court's exclusion of Dr. Halloran's opinions and radiology report.

Unlike Dr. Bekavac who was permitted to provide some testimony, although no standard of care and breach of the standard of care opinions, Dr. Halloran was not allowed to testify at all. Dr. Halloran was asked by Dr. Bekavac to over read the CT angiogram dated August 18, 2014. (Trial Day #2, Tr. p. 99, L.11 – p. 100, L. 1). Dr. Halloran's interpretation was consistent with Dr. Bekavac's interpretation.

The McGrews pointed out the importance of Dr. Halloran to the Trial Court:

> THE COURT: You do, however, have another expert who's gonna come in and testify about this issue of the reading of the radiology report, the blockage report?
>
> MR. DIAZ: He's not a radiologist. He will testify that in his view, just as Dr. Otoadese did his own sort of eyeball test, he did essentially the same thing and will testify that it's consistent with what Dr. Bekavac

and Dr. Halloran are saying. It's no more than about 40 percent stenosis.

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So I guess, for all of those reasons, I feel that while Dr. Bekavac and Dr. Halloran can certainly testify as to the treatment they provided to the Plaintiff, I do not believe that they should be allowed to testify with regard to their review of the test result or their opinion of the decision to go forward with the surgery based upon the test result.

MR. DIAZ: Your Honor, if I may?

THE COURT: Yep.

MR. DIAZ: This is obviously a big -- a big change in how we were gonna try this case.

THE COURT: Right.

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MR. DIAZ: Well, there's two issues: One with regard to the fact that Dr. Halloran should be able to explain how he arrives at 32, what exactly he did versus what Dr. Bekavac thinks he did or what Dr. Bekavac did himself.

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MR. DIAZ: I'm confused, Your Honor. Are we saying now that Dr. Halloran cannot testify and that we can't actually show the jury how he came to his 32 percent, because it's a mathematical formula, Your Honor, and that's what the detailing in the -- in Exhibit 13 is.

THE COURT: But see, the two of you have the advantage of knowing what your other experts are going to say, and I don't know what your experts are going to say, whether they're going to talk about how to use those, how you do that mathematical formula, et cetera.

> MR. DIAZ: Well, Your Honor, I don't have a radiologist other than Dr. Halloran. Dr. Halloran was my radiologist, and the Court's basically saying I can't call a radiologist here, and now, the Court's going to not even allow the report in.
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> ***
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> MR. DIAZ: I'll tell you what's gonna happen, Your Honor, because I know what's gonna happen. They're going to bring in their experts and they're going to show up, they're going to put that CTA up, and they're gonna -- you know, we -- we've seen it already in their demonstrative exhibits. They're going to show what the 65 percent looks like, and I'm not going to be able to do anything about it.

(Trial Day #1, Tr. p. 17, L.9-17; Tr. p. 34, L. 10-21; Trial Day #2, p. 128, L. 7-11; Tr. p. 137, L. 1-15; and Tr. p. 138, L. 21 – p. 139, L.2)

Given the Trial Court's ruling excluding Dr. Halloran, the McGrews were left without a radiologist to explain the findings on the CT angiogram. They were unable to explain how Dr. Halloran arrived at his opinion that there was only 32% stenosis in the relevant carotid artery. Dr. Bekavac was not versed in the methodology and could not explain how Dr. Halloran arrived at 32%. They were without the ability to explain any mathematical formula used to calculate the 32% stenosis as would have been available with the testimony of Dr. Halloran. It was important for the jury to understand how the CT angiogram should have been read, what measurements were taken by Dr. Halloran and how those measurements were the mirror-image- opposite of the assessment made by Dr. Otoadese in reviewing the CT angiogram. Dr. Halloran was the McGrews' radiology expert; without him, the McGrews

were not able to demonstrate Dr. Otoadese's error. They were without the ability to counter the argument from Dr. Otoadese's experts about what is visible on the CT angiogram. They were left with a simple number, 32%, and an inability to explain to a jury how that was arrived at and how it factored into Dr. Bekavac's criticism of Dr. Otoadese.

Because of the restrictions placed by the Trial Court, Dr. Otoadese's counsel once again took full advantage:

> You know, there's been a fair amount of talk about Dr. Bekavac's opinion after the fact that it was 40 percent. He disagrees with Dr. Cammoun's 65 percent. His record references Dr. Cammoun's 65 percent. And he thinks in his view, Dr. Bekavac said after the fact he thought it was 40 percent. **We've heard from Halloran -- all you've heard about Dr. Halloran is a number, 32 percent. You have heard from Dr. Tony and Dr. Gebel about the detailed findings Dr. Cammoun made in those measurements.**
>
> ***
>
> **I'm not complaining about Dr. Bekavac. I have no idea how he got to his conclusion. He told us he didn't do measurements himself. He sent to it Dr. Halloran. Halloran told him 32 percent. We really don't have that much detail about that, but we do have detail from Dr. Cammoun and Dr. Gebel and Dr. Otoadese who have explained it. That's what the evidence has been in this case.**

(Trial Day #6, Tr. p. 51, L. 4-12; and Tr. p. 57, 8-14) (emphasis added)

Dr. Halloran is a neuroradiologist who is qualified to comment on the information available from a CT angiogram. It is customary for him to do over reads of imaging studies. (Trial Day #3, Tr. p. 6, L. 21-24; p. 7, L. 9 – p. 8, L. 5). Dr. Halloran was qualified to comment on the interpretation of a CT

angiogram and the court should have permitted him to testify to his review, how he arrived at his conclusions and the relevance of his findings to the analysis made by Dr. Bekavac. The Trial Court's decision to exclude Dr. Halloran prevented the McGrews from placing that information before the jury.

Dr. Halloran testified that his radiology report became part of the Allen Memorial Hospital chart, a medical record, and should also have been admitted into evidence without redaction pursuant to Iowa R. Evid. 5.803(4) or 5.803(6). (Trial Day #3, p. 12, L. 19 – p. 13, L.4).

Again, where the court found that the McGrews fully complied with the disclosure requirement, there is no legal or discretionary support for the exclusion of expert testimony by Dr. Halloran. The Court's decision to prohibit Dr. Halloran, a local physician and friend of defendant, from testifying to his review of the CT angiogram and to his methodology in arriving at the conclusions that he sets out in his radiology report, when he was properly designated and his opinions fully disclosed, is reversible error.

III. IN PROHIBITING CROSS EXAMININATION OF DR. OTOADESE ON HIS BACKGROUND AND WORK HISTORY, THE TRIAL COURT ABUSED ITS DISCRETION AND CREATED AN INACCURATE AND PREJUDICIAL IMPRESSION OF THE DEFENDANT.

Preservation of Error. The McGrews resisted Dr. Otoadese's Motion in Limine to prevent certain evidence regarding the qualifications and credibility of Dr. Otoadese. The McGrews objected on the record to the Trial Court's decision to exclude certain evidence regarding the qualifications and credibility of Dr. Otoadese. (Trial Day #5, Tr. pp. 7-9). The McGrews filed a timely Motion for New Trial on March 7, 2019 raising the Trial Court's decision to prevent certain evidence regarding the qualifications and credibility of Dr. Otoadese as an abuse of discretion. The McGrews have preserved error for review.

Standard of Review. The standard of review on excluding impeachment evidence is for abuse of discretion. *Mohammed v. Otoadese*, 738 N.W.2d 628 (Iowa 2007) ("We review the district court's determination of relevancy and admission of relevant evidence for an abuse of discretion. An abuse of discretion exists when 'the court exercised [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.').

Merits.

A. Applicable Law:

> A witness is qualified to assist the jury as an expert to resolve a disputed fact if the witness has adequate "knowledge, skill, experience, training, or education" on the subject matter in question. All expert witnesses must be qualified in the area of their testimony based on one of the five areas of qualification. Yet, a particular degree or type of education is not needed. Moreover, an expert does not need to be a specialist in the area of the testimony as long as the testimony is within the general area of expertise of the witness. However, the qualifications of an expert can only be properly assessed in the context of the issues to be determined by the fact finder.

Ranes v. Adams Labs., Inc., 778 N.W.2d 677, 687 (Iowa 2010)

> Ordinarily, impeachment evidence is admissible if it is relevant to undermining the credibility of the witness being impeached. In the case of an expert witness, evidence may be introduced "to lessen the weight of his expert opinion."
>
> ***
>
> Error in excluding evidence may be claimed "only if exclusion of the evidence affected a party's substantial rights." … "We presume prejudice and reverse unless the record affirmatively establishes otherwise."

Eisenhauer v. Henry Cty. Health Ctr., 935 N.W.2d 1, 18-19 (Iowa 2019)

> The purpose of cross-examination is to test the veracity of statements a witness made and to weaken or disprove the opposing case. Opposing counsel is free to cross-examine an expert witness and challenge the strength of his or her testimony. …. None of these issues pertains to the admissibility of such evidence, but only to the weight to be given such expert opinion.

Heinz v. Heinz, 653 N.W.2d 334, 342 (Iowa 2002)

B. Background and Work History of an expert witness are always relevant as impeachment.

Dr. Otoadese testified in a pre-trial deposition that in 2008-2009 he "voluntarily" surrendered his hospital privileges to perform heart surgery, which at the time constituted 50-60% of his overall time performing surgeries. Dr. Otoadese then filed suit against Allen Memorial Hospital relating to these surrendered privileges and reached a confidential settlement. But, notwithstanding that settlement, Dr. Otoadese has not performed "open heart" surgeries since 2009. He has admitted that at the time he was performing "open heart" surgeries, they constituted 50-60% of his surgery time and approximately 30% of his overall surgeries. (Deposition of Dr. Otoadese, p. 15, L. 16 - p. 19, L. 21).

In 2012, Dr. Otoadese was "kicked out" (terminated) from Cedar Valley Medical Specialists and on January 1, 2013 he opened Northern Iowa Cardiovascular and Thoracic Surgery Clinic, P.C. In the summer of 2014, Dr. Otoadese's surgeries were limited to vascular and nonvascular thoracic areas of the body and he was still not performing open-heart procedures---consistent with the fact that he no longer had privileges to perform open heart surgeries. (Deposition of Dr. Otoadese, p. 12, L. 25 - p. 14, L. 17).

Initially, it is important to understand that the information sought to be introduced regarding Dr. Otaodese's qualifications and credibility was not in

dispute. They were true statements conceded by Dr. Otoadese himself in his deposition. Nevertheless, the Trial Court ruled these facts inadmissible while stating in its ruling:

> THE COURT: I do believe that once he takes the stand, and in light of some of the statements made in opening about his background, that his background is fully -- is fully subject to being explored by counsel for the Plaintiff to an extent, meaning, where did you work? How long were you there? When did you leave? What was the nature of your practice? Those types of things, I think, are -- can be gotten into. References to kicked out or the nature in which his relationship ended with CVMS, I think is inadmissible.

(Trial Day #5, Tr. p. 9, L. 10-19).

The statements made in opening included the following:

> Dr. Tony is what is called a cardiovascular surgeon. He'll explain to you what that means, but essentially, his practice is devoted to performing surgery on the vessels in the body, the arteries and the veins. He also does chest surgery. That's the thoracic component of his practice.
>
> Dr. Otoadese went to State University of New York. Following that, he did a five-year residency in general surgery. And you'll hear from the doctors that that is part of the training process that they go through to gain skills in their chosen specialty.
>
> After completing his residency in New York, Dr. Tony came to Iowa. He came specifically to the University of Iowa, the hospitals and clinics in Iowa City, where he did a four-year fellowship in cardiothoracic surgery. There was a research component to that, as well as the surgical component, and upon completing that training, he decided to remain here in Iowa. He is board certified in both general surgery and thoracic surgery, and he's been practicing here in the Cedar Valley for more than 20 years.
>
> This case involves his care and treatment, of course, of Mr. McGrew and a carotid surgery that he performed. And you'll hear that Dr. Tony

> has performed hundreds of these procedures over the course of his career.

(Trial Day #2, Tr. p. 27, L. 3 – p. 28, L. 1).

The purpose for this outline of Dr. Otoadese's background in Opening Statement is to establish him as an expert, knowledgeable about his craft, someone who should be trusted to know his profession and to provide appropriate care. But that's only part of the story. Dr. Otoadese is someone who has struggled professionally, having been told by the only hospital he works at that he will not be allowed to perform open heart surgeries anymore because his care threatens the health and safety of his patients. He has also been terminated (in his own words, "kicked out") by the medical group he belonged to for 16 years. He then opens a medical practice entitled "Northern Iowa Cardiovascular and Thoracic Surgery Clinic, P.C." which suggests that he practices cardiovascular surgery, when he is actually only doing vascular and thoracic surgery. Finally, as was learned a month after the verdict in his favor, Dr. Otoadese was being investigated for 5 cases of incompetence, ultimately admitting to incompetency.[5]

[5] This issue is not before this court because this information was not revealed until after the 15-day post-trial motion deadline. Nevertheless, it provides further information about the troubles that this physician has had.

This is a doctor that has found himself consistently in the spotlight for questionable care. Yet, the jury does not get to hear any of this information. In fact, it gets to hear only one side ---the side portrayed by Dr. Otoadese. It paints an unfair and prejudicial picture of this practitioner.

Now, he could have chosen not to take the stand. If so, the McGrews would have been unable to cross-examine him with his complete background. But he chose to take the stand and testify about his background and his professional experience. And he chose to have his lawyer provide one version of his qualifications and background during opening statement. Just like the distortion of Dr. Bekavac's testimony, the jury hears a distorted version of his background and professional experiences. When this occurs, the McGrews are deprived of a fair trial.

Dr. Otoadese was passed off as an expert in opening, by his testimony, and throughout the trial. He was recognized by the jury to be an expert. As such, he should have been subjected to the same scrutiny given to retained expert witnesses.

In *Ward v. Epting*, 351 S.E.2d 867 (S.C. 1986), the South Carolina Court of Appeals stated the rule applicable to medical professional defendants as experts:

> During the trial, Dr. Epting's counsel requested the record show Dr. Epting taking the witness stand as a party, not as an expert. Counsel

> stated he was not asking for any ruling at all, but was merely putting it on the record….
>
> Where a physician sued for malpractice testifies as an expert, evidence as to his age, practice, and like matters going to his qualifications as an expert is admissible. 61 *Am. Jur. (2d) Physicians, Surgeons, and other Healers*, Section 346 (1981).
>
> Although Dr. Epting stated she would not testify as an expert, her qualifications as an anesthesiologist were brought out on direct examination.

Ward at 872.

In *Hutchison v. American Family Mut. Ins. Co*., 514 N.W.2d 882 (Iowa 1994), the plaintiff objected to testimony from defendant's retained expert because he was not board certified in neuropsychology and because he was a psychologist and not a medical doctor testifying about medical causation. In rejecting this objection, the court took pains to point out that the ultimate assessment of qualifications was left to the trial process including cross-examination and jury assessment of the witness. The court stated:

> Dr. Moore has board certification as a clinical psychologist, holds a Ph.D. in clinical psychology, and has substantial experience in neuropsychology. Although Dr. Moore lacked board certification in neuropsychology, we believe this fact went to the weight of his testimony, not its admissibility.
>
> ***
>
> Although few of these restrictions on experts strike us as fundamentally unsound, we refuse to impose barriers to expert testimony other than the basic requirements of Iowa rule of evidence 702 and those described by the Supreme Court in *Daubert*. The criteria for qualifications under rule 702--knowledge, skill, experience, training, or education--are too

> broad to allow distinctions based on whether or not a proposed expert belongs to a particular profession or has a particular degree.
>
> ***
>
> Similarly, we believe with the aid of vigorous cross examination, the jury is fully capable of detecting the most plausible explanation of events. ….
>
> ***
>
> Moreover, plaintiffs had ample opportunity to discredit Dr. Moore. Plaintiffs' counsel subjected Dr. Moore to thorough cross examination regarding his qualifications and the basis of his testimony, placing special emphasis on his lack of medical qualifications. …

Hutchinson at 886-889

Finally, in *Andersen v. Khann*, 913 N.W.2d 526 (Iowa 2018), the Court held that the personal characteristics of a physician may establish a duty of disclosure as part of obtaining informed consent for treatment. In discussing the duty to disclose surgical experience, the Court noted the following:

> Indeed, at trial several experts testified regarding the number of Bentall procedures they had performed and their training to perform the procedure in order to establish their competency to testify as expert witnesses. It stands to reason that if such information is relevant to establishing a witness's expertise, such information could be material to a reasonable patient's decision to or not to undergo a particular treatment.

Id. at 540 (emphasis added).

The Court cited with approval a Louisiana Court of Appeals decision that "held the physician had a duty to disclose his chronic alcohol abuse."

Andersen at 542 (citing to *Hidding v. Williams*, 578 So. 2d 1192, 1196 (La. Ct. App. 1991)). The Court made clear that the qualifications of a physician may be relevant to consent, and in the process highlights that a physician's history is important in assessing their credibility.

Dr. Otoadese contends that permitting evidence of the qualifications of the defendant physician would be more prejudicial than probative. However, it would be more prejudicial not to tell the jury about the qualifications and working history of this physician. Under what circumstances is the qualifications of an expert physician not probative? Under what circumstances is the working history of an expert physician not probative? If prejudice exists, it does so because defendant's qualifications create such prejudice. It is not prejudice created by the McGrews. If any such prejudice exists, it cannot outweigh the probative value of a jury understanding a physician's qualifications. The Trial Court's ruling prohibiting the McGrews from providing a complete picture of Dr. Otoadese was one further distortion of this trial and permitted Defense counsel to mislead the jury as to the qualifications of Dr. Otoadese.

In a case where credibility of an individual is so important, a full and fair assessment of the qualifications of the defendant is necessary. Plaintiffs' due process rights under the Iowa Const., specifically art I, §9, are implicated

when the court limits evidence regarding the qualifications of a defendant in a medical negligence claim. It leaves the wrong impression with this jury and in the process prejudices the McGrews.

While the Trial Court is given discretion to allow certain testimony about experts, in this case, when the information is one-sided and leaves the jury with an unfair impression of the defendant, the failure to provide the jury with a complete picture of his work history is prejudicial and results in an abuse of discretion.

CONCLUSION

The McGrews were prejudiced by the inability to put forward their case in its entirety. They were left with a shell of the case that they sought to submit. This was directly a result of the court's decision to limit the testimony of Dr. Bekavac and outright prohibit the testimony of Dr. Halloran. It was then exacerbated by the Trial Court's refusal to allow evidence of Dr. Otoadese's prior work history to offset the distorted impression left by the defense's limited description of his background, qualifications and work experience.

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

REQUEST FOR ORAL SUBMISSION

The McGrews request the opportunity for oral argument.

Respectfully submitted,

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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.

_____/s/ Martin A. Diaz____

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_____/s/ Martin A. Diaz__