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 FOR BLACK HAWK COUNTY LACV 130355
THE HONORABLE KELLYANN LEKAR

Defendants-Appellees' Final Brief

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Routing Statement

Defendant-Appellee Dr. Eromosele Otoadese[1] agrees that this case is appropriate for transfer to the Court of Appeals as it involves the application of existing legal principles. *See* Iowa R. App. P. 6.1101(3).

Statement of the Case

Nature of the case.

This is a medical malpractice case arising from a carotid endarterectomy surgery performed by Dr. Otoadese on Plaintiff William McGrew. Plaintiff suffered a stroke—a known complication of the surgery. Plaintiffs alleged the surgery was unnecessary and that Dr. Otoadese was negligent in recommending it. The jury disagreed, finding in favor of Dr. Otoadese.

In their nature of the case, Plaintiffs suggest the district court erred in excluding medical documentation from two physicians (Dr. Ivo Bekavac and Dr. John Halloran), including a criticism as to whether the surgery performed by Dr. Otoadese was justified. Even assuming arguendo there is a "criticism" in the medical reports, this is not an accurate description of the evidentiary issue before the district court. Plaintiffs actually sought to introduce far more from the

[1]The claim against Defendant Northern Iowa Cardiovascular and Thoracic Surgery Clinic, P.C. was based upon the alleged negligence of Dr. Otoadese. The jury was instructed to treat the two Defendants as a "single party." *See* App. 203 (Court's Instruction 6). Defendants-Appellees are referred to collectively as "Dr. Otoadese." References to Plaintiff singularly are to Plaintiff William McGrew.

physicians, including their opinions about the standard of care that applied to Dr. Otoadese and that Dr. Otoadese violated that standard. Such opinions are not set forth in the physicians' medical reports[2] and were never otherwise disclosed to Dr. Otoadese—ever.

Course of proceedings.

This case was filed on July 29, 2016. App. 5 (Petition). Prior to trial, Plaintiffs settled with radiologist Dr. Driss Cammoun. Plaintiffs' brief at 11. Trial commenced against Dr. Otoadese on February 26, 2019 and on March 5th, the jury returned a verdict in his favor. App. 205-08 (Order, 3/7/2019).

The district court denied Plaintiffs' motion for a new trial on December 8, 2019. App. 227-35. Plaintiffs timely appealed. App. 236-37 (Notice, 12/26/2019).

Plaintiffs refer to a procedural matter which is *not* an issue in this appeal—a post-trial Board of Medicine settlement with Dr. Otoadese which Plaintiffs incorrectly argue constitutes an admission of incompetence.[3] Plaintiffs have suggested they would have been allowed to conduct discovery and introduce evidence about the Board of Medicine investigation had it been disclosed.

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[2] *See* App. 253-56 (Court Exhibits 1-2).

[3] *See McClure v. Walgreen Co.*, 613 N.W.2d 225, 235-36 (Iowa 2000) (licensing board charges and settlement inadmissible in a civil case involving the licensee; charges were merely unproven assertions of wrongdoing and nothing in settlement "amounted to an *admission* of wrongdoing") (emphasis in original).

Plaintiffs are mistaken on this issue for many reasons including that Board investigative information is not discoverable or admissible.[4] Regardless, the issue is irrelevant in this appeal.

Summary of the facts.

Plaintiff suffered a stroke after a carotid endarterectomy surgery performed on September 2, 2014 by Dr. Otoadese. Day 4, 132:25-133:11 (Gebel).[5] Plaintiffs' expert, surgeon Dr. Carl Adams, agreed that a stroke is a known risk and complication of this particular surgery. Day 4, 65:1-4; *see also id*. 131:8-132:12 (defense expert Gebel, explaining how stroke can occur); Day 5, 129:12-24 (defense expert Levett, explaining risk of stroke). Dr. Otoadese returned Plaintiff to surgery on September 3, 2014. Day 4, 45:18-46:1 (Adams).[6]

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[4] *See* Iowa Code §272C.6(4) (licensing board investigative information is privileged, confidential, and not discoverable or admissible); *Cawthorne v. Catholic Health Initiatives*, 743 N.W.2d 525, 528 (Iowa 2007) ("We hold that [§]272C.6(4) prohibits admission of [Board] investigative evidence"); App. 214-25 (Defendants' resistance to Plaintiffs' supplemental motion for new trial, 5/6/2019).

[5] Dr. Otoadese refers to the transcript by Trial Day as titled by the court reporter as Day 1 (February 26) through Day 6 (March 5, 2019).

[6] The return to surgery was at the insistence of Plaintiff's family and the recommendation of another treating physician. Day 5, 84:4-86:2 (Otoadese). Plaintiffs initially argued a delay in the second surgery supported a lost chance theory and related evidence was introduced. *See* App. 17-18 (Plaintiffs' Proposed Instruction No. 11, 2/7/2019). This theory was ultimately withdrawn by Plaintiffs. Day 5, 163:1-3.

While Plaintiffs asserted an informed consent claim (also rejected by the jury), the claim upon which their appeal is based was an allegation that:

> Dr. Otoadese was negligent by failing to meet the standard of care in performing an unnecessary surgery on William McGrew's right carotid artery on September 2, 2014.

App. 204 (Court's Instruction 9, 3/7/2019).

An important issue at trial on whether Plaintiff's surgery was necessary concerned the degree of stenosis (or narrowing) of the carotid artery. The carotid arteries in the neck supply blood flow to the brain and, when narrowed with plaque, there is a risk of stroke. Day 4, 105:2-106:1, 109:2-110:9 (Gebel). The parties' experts agreed that if the plaque is ulcerated or irregular (as was Plaintiff's), it increases the risk of stroke as the plaque is more likely to break off. Day 4, 62:21-63:19 (Plaintiffs' expert Adams agreeing Plaintiff had ulcerated plaque which *quadrupled* the risk of stroke); *id.* 112:19-113:1, 118:7-22 (defense expert Gebel); *id.* 130:15-23 (Gebel: "I think Dr. Adams and I do strongly agree on this one point" as to increased risk of stroke).

In a carotid endarterectomy procedure the plaque that is narrowing the artery is removed. Day 4, 124:7-9 (Gebel). There was general agreement by the parties that surgery may be offered a patient when the stenosis is 60-70% in combination with a symptom, such as a transient loss of vision (amaurosis fugax) on the same side. Day 4, 36:20-37:8 (Plaintiffs' expert Adams); Day 5, 121:6-123:12 (defense

expert Levett, surgery is recommended if patient has symptoms, such as amaurosis fugax, and 50% or more stenosis).

In 2014, Plaintiff experienced a transient loss of vision, a condition referred to as amaurosis fugax, which ultimately resulted in his referral to vascular surgeon Dr. Otoadese.[7] Day 4, 106:10-22 (Gebel). Dr. Otoadese ordered a CT angiogram (sometimes referred to as a CTA) of Plaintiff's carotid arteries, a procedure which determines the extent of the stenosis and the composition of the plaque. Day 4, 110:10-112:5 (Gebel). The angiogram was interpreted by former Defendant radiologist Dr. Cammoun as showing 65% stenosis on the right. Day 5, 37:14-25, 40:24-42:2 (Otoadese); App. 251-52 (Trial Exh. A. 37 at 37-38).

While not using the same method as a radiologist, Dr. Otoadese also reviewed the angiogram and estimated the stenosis as 70%. Day 5, 47:3-22, 50:25-51:7 (Otoadese). The plaque was ulcerated and irregular. *Id.* 50:17-51:7. Given the stenosis of 65-70%, the nature of the plaque, and Plaintiff's symptoms,[8] Dr. Otoadese recommended surgery. *Id.* 52:10-53:5; App. 249 (Trial Exh. A at 6).

[7] *See* Day 5, 24:14-15 (Dr. Otoadese is a vascular and thoracic surgeon).

[8] There was an inconsistency in the medical records of Plaintiff's eye doctor as to which eye was involved. *See* Day 2, 75:21-77:18 (Mauer). Consistent with Dr. Otoadese's medical records, Dr. Otoadese testified Plaintiff told him the vision problem was in the right eye. Day 5, 29:10-17 (Otoadese); App. 249-50 (Exh. A).

Dr. Otoadese's experts, cardiovascular and thoracic surgeon Dr. James Levett[9] and neurologist Dr. James Gebel,[10] agreed that surgery was appropriate. Day 5, 120:23-121:14 (Levett, surgery appropriate given Plaintiff's eye complaint and stenosis of 65-70%); Day 4, 124:2-24, 127:8-10 (Gebel, surgery appropriate given the "complex ulcerated fissured plaque and also because there was a significant blockage"). To Dr. Gebel, the thing that struck him the most in terms of the need for surgery was "how complex and irregular and unstable that plaque looked." Day 4, 124:21-24, 129:21-130:5.

Plaintiffs' surgical expert disagreed. Dr. Adams explained he was retained to "determine what the standard of care would have been for a surgeon evaluating and treating a patient such as Mr. McGrew." Day 4, 18:1-5. He testified at length about multiple scenarios with different degrees of stenosis, eye symptoms, and the presence of ulcerative plaque and what the standard of care required of the surgeon in each. Day 4, 32:20-40:5.[11]

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[9]Day 5, 114:18-21, 116:18-22.

[10]Day 4, 91:19-24, 93:19-25.

[11]There was nothing even remotely comparable ever disclosed for physicians Drs. Bekavac or Halloran as to their opinions on the applicable standard of care. In fact, there were *no* disclosed opinions on standard of care for these physicians. *See* App. 11-14 (Plaintiffs' Designation 2/6/18); App. 97-100 (Interrogatory Answer, 3/7/18); App. 253-56 (Court Exh. 1-2). Nor did Plaintiffs elicit such opinions in offers of proof. Day 2, 94:7-121:22 (Bekavac); Day 3, 6:1-16:9 (Halloran).

Dr. Adams testified that the stenosis was 35-45% and Plaintiff was not a candidate for surgery. Day 4, 19:3-23. He continued that even if Plaintiff's eye complaint involved the right eye, as Dr. Otoadese believed, Plaintiff was still not a surgical candidate with 35-45% stenosis. *Id.* 32:20-33:5. However, if Plaintiff's eye complaint involved the right eye and the stenosis was 70% (as Dr. Otoadese determined), Dr. Adams would recommend surgery (as Dr. Otoadese did). *Id.* 36:20-37:8.

Plaintiffs were also allowed to introduce evidence from two more physicians on the percent of stenosis. After Dr. Otoadese's surgery on September 2, 2014 and Plaintiff's stroke, Plaintiff's family consulted with neurologist Dr. Ivo Bekavac on September 26, 2014 to "establish care and get [a] second opinion." Day 2, 140:19-23, 145:19-23 (Bekavac before jury). The jury heard that Dr. Bekavac assessed Plaintiff's presurgery carotid stenosis as approximately 40%--which Dr. Bekavac viewed as significantly different from the 65% in the angiogram report. *Id.* 147:9-148:11.

Dr. Bekavac was also allowed to testify that he asked board certified neuroradiologist Dr. John Halloran to interpret the angiogram given the discrepancy between his reading and the report and that Dr. Halloran arrived at 32% stenosis. *Id.* 150:8-20, 155:3-5; App. 246 (Trial Exh. 12).

Dr. Adams testified that Plaintiff was "absolutely not" a surgical candidate under the 32-40% stenosis determined by Drs. Bekavac and Halloran. Day 4, 18:18-19:6. Plaintiffs also elicited from Dr. Otoadese that, assuming Drs. Bekavac and Halloran were correct in their 32-40% determinations, Plaintiff would not have been a surgical candidate. Day 4, 89:7-19.

Plaintiffs also introduced evidence that Drs. Bekavac and Halloran were friends of Dr. Otoadese's and Dr. Bekavac was his former partner. Day 2, 141:20-142:6 (Bekavac); Day 4, 88:20-89:6 (Otoadese). In closing argument, Plaintiffs argued it was Dr. Bekavac that the jury could trust:

> . . . you're going to be looking for somebody you can trust in this case . . . and that's Dr. Bekavac. What interest does he have in this case? What is his desire in this case when he essentially comes and testifies to things that don't help his friend? And he gets the help of Dr. Halloran in confirming his suspicion that this was not--this was not 70 percent, but this was 40 percent. It is Dr. Bekavac that drives this case because without Dr. Bekavac's willingness to say that, there's no case here. . . .
>
> Drs. Bekavac and Halloran are friends of Dr. Otoadese, so trust in what they've provided to you.
>
> . . . Dr. Bekavac is aware that his friend, Dr. Otoadese, is the individual that did surgery on this patient.
>
> . . . Who is disinterested? Who has no interest in seeing anything bad happen to Dr. Otoadese or for the Plaintiff? Dr. Bekavac.
>
> . . . We got Dr. Bekavac who has no interest in this telling you it's only 40 percent, and you've got Dr. Halloran who has no interest in this telling you that he has 32 percent. In fact, both of them are friends

> of [Dr. Otoadese], so actually, you would expect it to be the other way around. . . .

Day 6, 16:6-18, 17:2-3, 30:13-15, 31:15-17, 32:18-23.

Argument

I. The district court's discretionary rulings regarding Drs. Bekavac and Halloran do not warrant a new trial.[12]

A. Introduction.

While reliance on "treating" physicians to provide testimony that is expert in nature is not unusual, Plaintiffs' desired use in this case was anything but usual. Plaintiffs' approach to this case has, from the outset, been that Drs. Bekavac and Halloran would testify at trial as to a standard of care that applied to Dr. Otoadese and that he breached that standard. *See,e.g.*, App. 7-8 (Petition, ¶¶22-28); App. 12-13 (Expert Designation). But, as explained below, Plaintiffs actually didn't know what the physicians would say on these subjects.[13] And if Plaintiffs didn't know—Dr. Otoadese didn't know. This is the context in which the issue was presented to the district court.

In addition to retained surgical expert (Dr. Adams), Plaintiffs designated neurologist Dr. Bekavac and radiologist Dr. Halloran. *See* App. 11-13 (Designation,

[12] Because the issues as to Drs. Bekavac and Halloran are closely related, Dr. Otoadese addresses both physicians together in Part I with some specific argument as to Dr. Halloran under Part II.

[13] *See* Part I.D.4; Day 2, 4:12-19 (court); Day 1, 15:10-11, 16:10-12, 17:18-18:1 (counsel).

2/16/2018). On September 26, 2014, *after* Plaintiff had the carotid surgery and stroke, he saw neurologist Dr. Bekavac for a "second opinion" as to whether the carotid endarterectomy was indicated. Day 2, 110:12-20, 119:3-120:18 (Bekavac offer of proof). Dr. Bekavac wrote the following:

> . . . [The angiogram] was read by Dr. Cammoun, who felt there was right ICA stenosis around 65%. I did review personally and showed to the patient and his daughter and son and my opinion stenosis of right ICA is approximately 40%. . . . *The patient wants to know exactly the reasoning behind surgery whether first surgery and second surgery was indicated.*
> . . .
> IMPRESSION:
> 1. The patient suffered right hemispheric embolic infarct after endarterectomy and occlusion of right internal artery. *Initially symptoms possibly related to amaurosis fugax, but 40% of stenosis was not significant to justify endarterectomy in my opinion.*
> . . .
> PLAN:
> . . .
> 3. I will ask Dr. Halloran, neuroradiologist to review CTA because of discrepancy between my review and Dr. Cammoun review. . . .

App. 253-55 (Court Exh. 1) (emphasized language redacted from Plaintiffs' Trial Exh. 11). Dr. Halloran reviewed the angiogram and wrote that the right carotid had 32% stenosis. App. 256 (Court Exh. 2); *see also* App. 246 (Trial Exh. 12).[14]

[14] Court Exhibit 1 (App. 253-55) is Dr. Bekavac's unredacted medical report from September 26, 2014. The redacted report was introduced as Trial Exhibit 11. App. 239-41. Court Exhibit 2 (App. 256) is Dr. Halloran's report concerning the pre-surgery angiogram that was not introduced to the jury. *But see* App. 246 (Trial Exh. 12 with 32% documented).

Plaintiffs disclosed what they intended to elicit from the two physicians at trial in an interrogatory answer prepared by counsel (but not signed by the physicians). App. 97-100 (March 7, 2018 Interrogatory Answer attached to Defendants' motion in limine, 2/12/32019 ("Interrogatory Answer")).[15] Plaintiffs indicated their intent to introduce opinions from both physicians as to the standard of care applicable to Dr. Otoadese, that Dr. Otoadese breached that standard of care, and causation. *Id.*; *see also* Plaintiffs' brief at 11, 16-19 (referencing physicians were to testify on standard of care and breach); *Id.* at 39 (arguing Dr. Bekavac should have been allowed to testify "to his opinions formed at the time that he wrote [Court Exhibit 1]"). However, at no time prior to trial (either in the medical reports or the Interrogatory Answer) did Plaintiffs disclose what Drs. Bekavac or Halloran opined was the standard of care breached by Dr. Otoadese or the opinions Dr. Bekavac formed when he wrote Court Exhibit 1. App. 97-100, 253-56 (Interrogatory Answer; Court Exh. 1-2).[16] Nor did Plaintiffs ever produce signed expert reports for either physician.

Citing *Hansen v. Central Iowa Hospital Corp.*, 686 N.W.2d 476 (Iowa 2004), Dr. Otoadese moved in limine on any "testimony or other evidence from treating health care providers that exceeds the proper scope of such testimony or

[15] The Interrogatory Answer was initially served 10/28/2016, supplemented 3/7/2018, and supplemented again 12/18/18. App. 97-100; App. 145-47, 156-59 (Exhibits to Plaintiffs' resistance to Defendants' motion in limine, 2/14/2019).

[16] As explained below (Part I.D.3a), Dr. Bekavac's medical report (Court Exhibit 1) does not contain standard of care or breach opinions.

constitutes inadmissible hearsay, including but not limited to after-the-fact non-treatment opinions of Dr. Bekavac and Dr. Halloran." App. 28-33 (Motion, 2/12/2019).

As set forth below, after listening to counsel argument over the course of several days, considering applicable rules and Iowa case law, and allowing unlimited offers of proof from both Drs. Bekavac and Halloran, the district court limited the evidence from both physicians to that formulated during their care and treatment. The court excluded evidence from the physicians that was generated in a role that was analogous to a retained expert.

Plaintiffs do not argue the district court abused its discretion in finding that Drs. Bekavac and Halloran were, in part, acting outside a treatment role. Nor do Plaintiffs argue *Hansen* does not apply. Instead, Plaintiffs argue that because the district court found (in Plaintiffs' view) that the physicians were fully disclosed, then the court essentially had no discretion to exclude any of their testimony. Plaintiffs are incorrect and read far too much into the court's discussion of disclosure. The district court's references to disclosure must be viewed in the entirety of the circumstances, applicable law, and the court's ultimate ruling. The district court was well aware of, and referenced, Dr. Otoadese's position that nearly all of the actual "opinions" from the physicians that Plaintiffs sought to introduce were unknown.

Importantly, Plaintiffs were still able to introduce the most critical evidence from the physicians—their assessments of the stenosis (32 and 40%) and Dr. Bekavac's view that his assessment was significantly different from Dr. Cammoun's (65%). Plaintiffs made much about this evidence with other witnesses and during closing argument. Plaintiffs also introduced Dr. Otoadese's own testimony that surgery was *not indicated* if Drs. Bekavac and Halloran were correct. There was no prejudice.

B. Standard of review.

This issue is reviewed for an abuse of discretion. *See Hansen*, 686 N.W.2d at 479-80. In addition, this Court's "review of rulings on motions for new trial depends on the grounds for new trial asserted in the motion and ruled upon by the district court." *Id.* In the post-trial proceedings, the district court considered this issue under an abuse of discretion standard. App. 228 (Order, 12/8/2019).

"Rulings within the trial court's discretion are 'presumptively correct, and a party challenging the ruling has a heavy burden to overcome the presumption.'" *Williams v. Dubuque Racing Ass'n*, 445 N.W.2d 393, 394 (Iowa Ct. App. 1989) (citation omitted).

"An abuse of discretion occurs when the court's decision is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree." *Pexa v. Auto Owners Ins. Co.*, 686

N.W.2d 150, 160 (Iowa 2004). A trial court has "broad discretion" regarding the admissibility of evidence. *Estate of Llewellyn ex rel. Johnson v. Genesis Medical Center*, 2004 WL 2579741 *2 (Iowa Ct. App. 2004).

C. Error preservation.

Plaintiffs did not preserve error.

The issue before the district court was Plaintiffs' request to submit comprehensive expert testimony from Drs. Bekavac and Halloran--including on the standard of care that Dr. Otoadese violated. *See* App. 112 (Plaintiffs' resistance to motion in limine, physicians "would testify to the standard of care and the breach of the standard of care."). Those opinions are, however, unknown. Neither the medical reports authored by the physicians (App. 253-56, Court Exhibits), the Interrogatory Answer authored by Plaintiffs' counsel (App. 97-100), or the physicians' offers of proof reflect these opinions (Day 2, 94:7-121:22, Bekavac; Day 3, 6:1-16:9, Halloran).

The record does not contain what Plaintiffs sought to introduce—what these physicians opined as to the applicable standard of care for a vascular surgeon in recommending (or not recommending) carotid surgery that was breached in this case. *See Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 317 (Iowa 1992) (party failed to preserve error by failing to make an offer of proof of evidence excluded by trial court's ruling as "there is nothing preserved to review on

appeal."); *State v. Ritchison*, 223 N.W.2d 207, 212-13 (Iowa 1974) (one purpose of offer of proof is to give reviewing court a record as court "cannot predicate error upon speculation as to answers which would have been given to questions.").[17]

If Plaintiffs desired to introduce something less from these two physicians, they should have identified such limited evidence so the district court could rule upon *it* –rather than Plaintiffs' request to introduce full expert testimony from each physician. *See DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002) ("'[I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.'").

D. The district court did not abuse its discretion.

1. Iowa law.

Iowa Code §668.11, applicable to professional negligence actions, requires disclosure of the identity of expert witnesses, their qualifications, and the purpose for calling the expert. Iowa Code §668.11. The statute does not require disclosure of expert opinions. *See Morales v. Miller*, 2011 WL 222527 *6 (Iowa Ct. App. 2011).

Iowa Rule of Civil Procedure 1.500 provides:

[17] While Plaintiffs suggest their offers of proof were limited, Plaintiffs' brief at 19, they were not. The district court allowed Plaintiffs to go beyond the subject of whether the physicians were acting as treating physicians. Day 2, 116:12-15 (Bekavac); Day 3, 13:5-23 (Halloran).

1.500(2) *Disclosure of expert testimony.*

. . .

b. *Witnesses who must provide a written report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain the following:

(1) A complete statement of all opinions the witness will express and the basis and reasons for them.

(2) The facts or data considered by the witness in forming the opinions.

(3) Any exhibits that will be used to summarize or support the opinions.

(4) The witness's qualifications, including a list of all publications authored in the previous ten years.

(5) A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.

(6) A statement of the compensation to be paid for the study and testimony in the case.

c. *Witnesses who do not provide a written report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(1) The subject matter on which the witness is expected to present evidence under Iowa Rules of Evidence 5.702, 5.703, or 5.705.

(2) A summary of the facts and opinions to which the witness is expected to testify.

. . .

Rule 1.500(2).[18]

In *Hansen v. Central Iowa Hospital Corp*, 686 N.W.2d 476 (Iowa 2004), the Court held causation opinions from a treating physician were admissible notwithstanding the failure to designate the expert under Iowa Code §668.11 (or produce an expert report under applicable procedural rules). *Id.* at 484. The opinions were admissible notwithstanding non-disclosure because they arose out of treatment. *Id.* The Court described the applicable rule for when a treating physician's opinion testimony is admissible without a disclosure. The "'paramount criterion'" is whether the treating physician's opinion "'relates to facts and opinions arrived at by a physician in treating a patient or whether it represents expert opinion testimony formulated for purposes of issues in pending or anticipated litigation.'" 686 N.W.2d at 482 (quoting *Carson v. Webb*, 486 N.W.2d 278, 280-81 (Iowa 1992)). The "'reason and timeframe in which the underlying facts and opinions were acquired'" is critical in determining if the treating physician is focusing less on medical questions and more on legal questions. *Id.* at 483 (quoting *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 612 (Iowa Ct. App. 1998)); *see also Morales*, 2011 WL 222527 *8 (testimony was beyond the scope of

[18] While the above rule (effective January 1, 2015) applies to this case, much Iowa case law on expert opinion disclosures concerns predecessor rules. Prior to Rule 1.500(2), the requirement for signed expert opinions was found in Rule 1.508 that required a signed opinion in response to an interrogatory. Prior to Rule 1.508, the requirement was found in Rule 125. *See* Rule 1.508 (2020) (rule history); Rule 1.508(1) (2014).

treatment when physician "had to be briefed on what happened;" plaintiff failed to demonstrate opinions were reached while physician was treating plaintiff).

Important to this case, the *Hansen* Court cited with approval that "'even treating physicians may come within the parameters of rule 125 [that required signed expert disclosures] when they begin to assume a role in the litigation analogous to that of a retained expert.'" 686 N.W.2d at 483 (quoting *Morris-Rosdail*); *Day v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991) ("When a treating physician assumes a role in litigation analogous to the role of a retained expert," discovery under Rule 125 may be required; also discussing rule's requirement for expert signature). In other words, there is a point at which a party must produce a signed expert report for a treating physician.[19] That point was reached in this case as to Plaintiffs' desired introduction of standard of care and breach opinions from the physicians.

While the facts in *Hansen* involved a physician who was not disclosed under Iowa Code §668.11 (which is not the case here), the *Hansen* Court also discussed that treating physicians may need to comply with the rule requiring signed expert

[19] This is not unique to Iowa. *See, e.g., Avendt v. Covidien Inc.*, 314 FRD 547, 555 (E.D. Mich. 2016) ("As was the case before the 2010 Amendments [to Federal Rule of Civil Procedure 26], if a treating physician is going to offer expert testimony that goes beyond the diagnosis and treatment of the patient . . . that treating physician must still file a full blown expert report under 26(a)(2)(B).").

reports (now 1.500(2)(b)). *See* 686 N.W.2d at 481-83. *see also Day*, 469 N.W.2d at 677.

Hansen and the cases it discusses clearly support that when a treating physician ventures outside a treating role and assumes a role analogous to a retained expert, his or her "expert" opinions may be excluded at trial if not properly disclosed. This is precisely how *Hansen* has been applied. *See, e.g.*, *Sherrick v. Obstetrics & Gynecology Specialists, P.C.*, 2018 WL 5846055 *4 (Iowa Ct. App. 2018) (affirming exclusion of treating physician's testimony on "performing ultrasounds" as it "did not relate to the care she provided;" "The treating physician's opinion on the standard of care was expert testimony, and thus improper absent compliance with the required disclosures.") (citing *Hansen*); *see also Hagenow v. Schmidt*¸842 N.W.2d 661, note 4 (Iowa 2014) (concluding causation opinion from treating physician Dr. Bekavac that "went beyond" treatment "was subject to the disclosure and supplementation requirements of Rule 1.508," comparing *Hansen* which did not require disclosure given physician's causation opinion was formed during treatment).[20]

2. The district court's ruling.

[20] While the *Hagenow* Court affirmed admission of Dr. Bekavac's causation opinion, it did so because it *was* disclosed and the issue concerned the timing of disclosure. 842 N.W.2d at 670-71. In contrast, Drs. Bekavac and Halloran's standard of care and breach opinions were not disclosed in this case.

The district court did not take this issue lightly. The court listened to considerable argument and Plaintiffs were able to change the court's position to allow more evidence than it originally ruled. On the first day of trial during argument and before the offers of proof, the court ruled "I do not believe that [Drs. Bekavac and Halloran] should be allowed to testify with regard to their review of the [percent of stenosis] or their opinion of the decision to go forward with the surgery based upon the test result." Day 1, 34:10-16. After listening to Plaintiffs' argument in response, the court offered to "spend more time with this issue" and come back with "a more developed decision." *Id.* 39:4-9. The jury was dismissed and opening statements delayed. *Id.* 39:11-24; 42:10-22.

The next morning, after the district court studied *Hansen* and the rules, the court ruled that Dr. Bekavac could testify about his determination of the 40% percent stenosis but not that surgery was not justified—all subject to Plaintiffs' offer of proof. Day 2, 4:23-6:1, 7:1-4. The court determined that Dr. Halloran's testimony would be excluded unless it was established that his review of the angiogram was for treatment purposes (anticipated to be addressed in Dr. Bekavac's offer of proof). *Id.* 6:2-10. The court summarized that, based on its reading of Dr. Bekavac's medical report, "the patient was looking for opinions that were more closely related to those to be provided by an expert witness than those to be provided by a treating physician." *Id.* 8:3-7.

In his offer of proof, Dr. Bekavac agreed that he was asked to do two things: 1) establish a doctor/patient relationship with Plaintiff, and 2) offer a second opinion about the stroke to answer the family's questions. Day 2, 110:12-20, 97:22-25. He testified he always reviews prior imaging for new patients and that he asked Dr. Halloran to review the angiogram given the discrepancy between his view (40%) and Dr. Cammoun's (65%). *Id.* 98:16-22, 102:2-13.

As to the family's request for a second opinion, he agreed that he was "in retrospect, . . . looking back at [the procedure done] to see what [he] might have recommended." *Id.* 112:11-19. Under the court's questioning, he testified that had the family not asked if the surgery was indicated, he would "just say patient suffered stroke." *Id.* 119:3-120:18.

After Dr. Bekavac's offer of proof, the court heard argument again. Day 2, 122:6-124:23. The court maintained its decision:

> [T]his offer of proof did give me some clarity by being able to hear and see Dr. Bekavac and know how he's gonna testify . . . 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 . . . 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 . . .

Id. 125:7-25. The court agreed that Dr. Halloran's 32% finding could be introduced through Dr. Bekavac, alleviating the need to call Dr. Halloran, who "really wasn't treating the patient for this." *Id.* 127:7-22, 129:7-15; *see also* Day 3, 4:4-5:9, 20:6-17 (ruling as to Dr. Halloran).

The next day, Dr. Halloran testified in his offer of proof that he did not know at the time of his review of the angiogram that Plaintiff had already had surgery. Day 3, 10:13-11:19. He confirmed that his report was actually *not* generated for treatment as "the treatment had already occurred." *Id.* 14:10-15:10. As previously ruled by the court, Dr. Halloran was not allowed to testify (though his 32% stenosis determination had already been introduced through Dr. Bekavac). *See id.* 4:4-5:9, 20:6-17.[21]

In the post-trial ruling, *after* noting the defense position that Plaintiffs never provided expert reports for Drs. Bekavac and Halloran, the court affirmed its prior rulings at trial:

> . . . This Court continues to believe that the evidentiary determination made during the course of trial is correct under *Hansen* and is also correct under the *Iowa Rules of Civil Procedure* and the *Code of Iowa*. This Court is not persuaded on the Motion for New Trial that the Court's determination concerning the testimonies of Drs. Bekavac and Halloran was an abuse of discretion. Further, . . . even if the Court abused its discretion, the substantial rights of the Plaintiffs were not [materially] affected as a result of the ruling in light of the testimony

[21] Plaintiffs' trial exhibits were redacted consistent with the rulings. Day 2, 132:20-134:9 (discussing Bekavac report); Day 2, 138:16-139:15 (preliminary ruling on Halloran report); Day 3, 14:4-7, 20:23-21:2 (regarding Court Exhibits 1-2).

> that was permitted through Dr. Bekavac and the accompanying exhibits, as well as the testimony of the Plaintiffs' retained expert.

App. 229 (Order, 12/8/2019).

The district court's application of *Hansen* and the Rules was not an abuse of discretion. As the Court in *Hansen* noted, "an opposing party should . . . be able to expect that a treating physician's testimony will not include opinions on reasonable standards of care." 686 N.W.2d at 482 (treating physicians are not ordinarily required to formulate standard of medical care opinions in the course of treatment). The offers of proof confirmed that any opinions by Drs. Bekavac and Halloran about the applicable standard of care that was purportedly breached by Dr. Otoadese and that surgery was not justified were not formed during care and treatment. As the district court found, such opinions would have been developed in a role analogous to a retained expert. Day 2, 8:3-7. Accordingly, Plaintiffs were required to treat the physicians as retained experts or the physicians would be limited to their care and treatment opinions. *See Hansen*, 686 N.W.2d at 483.

Plaintiffs argue that the court could not limit the physicians because it found they were appropriately disclosed. As explained below, this is incorrect.

3. Plaintiffs did not disclose the opinions they sought to introduce.

Plaintiffs do not dispute that *Hansen* requires disclosure of a treating physician's standard of care opinions.[22] They argue "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*." Plaintiffs' brief at 29-30 (emphasis added). Dr. Otoadese agrees *Hansen* requires the disclosure of standard of care opinions from treating physicians for those opinions to be introduced at trial—but disagrees that Plaintiffs complied. Plaintiffs do not, and cannot, cite to any disclosure of what Drs. Bekavac and Halloran opined as to the applicable standard of care that Dr. Otoadese breached. Nor were Plaintiffs entitled to introduce such opinions under Rule 1.500(2).

a. The medical reports do not satisfy Rule 1.500(2)(b).

As discussed above, Iowa case law supports that expert reports are required when a treating physician intends to offer opinions at trial that were not formulated during care and treatment. The physician essentially steps into the role of a retained expert and, accordingly, the rule requiring signed expert reports

[22] Plaintiffs previously acknowledged the limitations on treating physicians consistent with the district court's ruling. In resisting Defendant Dr. Cammoun's motion for summary judgment, Plaintiffs argued Drs. Bekavac and Halloran could testify to opinions formed during care and treatment. *See* App. 16 (Plaintiffs' brief in resistance, 1/8/2019, "treating physicians . . can rely on the mental impressions they developed during the treatment process").

(1.500(2)(b)) applies.[23] *Day*, 469 N.W.2d at 677 ("When a treating physician 'assumes a role in litigation analogous to the role of a retained expert,'" rules pertaining to expert reports apply); *Hagenow*, 842 N.W.2d note 4 (same, quoting *Day*).[24]

Plaintiffs argued that, if such reports were required, the physicians' medical reports suffice. *See* Day 1, 16:21-17:1, 34:22-35:16. But those medical reports (Court Exhibits 1-2) do not contain opinions which Plaintiffs argue they should have been allowed to elicit—the applicable standard of care that was breached by Dr. Otoadese. Any suggestion that Court Exhibits 1-2 suffice as signed expert reports must be rejected outright on this basis.

While Dr. Bekavac's medical report includes: "40% of stenosis was not significant to justify endarterectomy in my opinion," App. 254, this is not a standard of care or a breach opinion. It is not a disclosure of a "complete

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[23]At one point the district court contemplated that Dr. Bekavac was "specially employed" under Rule 1.500(2)(b) as it does "coincide somewhat with the situation that we have here. Bekavac was consulted, and the nature of what's being sought from him to be put in by the Plaintiffs is specially employing him as an expert witness under the guise of a treating physician, for lack of better word." Day 1, 33:13-18.

[24] There is a good reason for the rule requiring signed expert reports. Without them, there is no certainty that a witness is actually willing to testify as the party hopes or represents. One purpose of expert reports is to allow the opposing party to prepare for trial without deposing the expert. *See R.C. Olmstead, Inc., v. CU Interface, LLC,* 606 F.3d 262, 271 (6th Cir. 2010) ("'report must be complete such that opposing counsel is not forced to depose an expert'").

statement" of an opinion "and the basis and reasons" for it. *See* Rule 1.500(2)(b)(1).

Moreover, as Dr. Bekavac testified in his offer of proof: "in medicine, as you know, we don't have to agree about something." Day 2, 99:4-5. A medical disagreement is not the equivalent of an opinion that a physician breached the standard of care. At one time in the proceedings, Plaintiffs conceded the evidence only supported a disagreement. *See* Day 5, 4:13-5:6 ("the way I look at it is I'm gonna be able to argue . . . that [the physicians] disagree with Dr. Otoadese. I think that's the state of the evidence, right? Court: Agreed.").

Even without Dr. Bekavac's own explanation that physicians are not required to agree, his statement is not, in and of itself, competent standard of care or breach evidence to support Plaintiffs' intended use. *See DeBurkarte v. Louvar*, 393 N.W.2d 131, 133 (Iowa 1986) (agreeing "testimony on what another physician would do is not sufficient to establish a standard of care."); *Bray v. Hill*, 517 N.W.2d 223, 226 (Iowa Ct. App. 1994) (same); *Surgical Consultants, P.C. v. Ball*, 447 N.W.2d 676, 681 (Iowa Ct. App. 1989) ("A physician's testimony as to his or her personal practices or policies, or as to how he or she would handle a specific case, does not suffice as evidence of the standard of care required of a physician."); *see also Freese v. Lemmon*, 267 N.W.2d 680, 687-88 (Iowa 1978) (physician

testimony about what that particular physician would do if presented the plaintiff's situation was insufficient to submit the medical malpractice case).

Further, extrapolation and speculation would be required to convert the statement to a breach opinion. *See Kush v. Sullivan*, 2013 WL 4437077 *5 (Iowa Ct. App. 2013) (affirming summary judgment in medical malpractice case for defendant, refusing to extrapolate from treating physician's statements to find evidence of breach). It is, for example, unknown if Dr. Bekavac's supposed breach opinion concerned Dr. Otoadese's own determination of stenosis, his use of Dr. Cammoun's opinion (rather than seeking Dr. Halloran's opinion), his consideration of the eye symptoms, or some combination of these. Dr. Bekavac's opinion as to what the standard of care required of Dr. Otoadese is unknown.

The statement does not even support Plaintiffs' desired argument that Dr. Bekavac was "critical" of Dr. Otoadese. *See* Day 5, 173:5-15 (ruling that Plaintiffs could not argue Drs. Bekavac and Halloran were critical of Dr. Otoadese, but could argue they disagreed). Plaintiffs did not ask Dr. Bekavac if he was "critical" of Dr. Otoadese in the offer of proof. It is unknown how Dr. Bekavac would have responded to such questions. And it appears Dr. Bekavac's disagreement with Dr. Otoadese may well have only pertained to the determination of the percent of stenosis--in other words Dr. Otoadese's reading of the angiogram.

As to Dr. Halloran, Plaintiffs complain on appeal that he was not allowed to explain his methodology in arriving at the 32% stenosis. This is not set forth in his medical report. App. 256 (Court Exhibit 2). It was not disclosed.

Further, Rule 1.500(2)(b) also requires "a list of all publications authored in the previous ten years," and a " list of all other cases in which, during the previous four years, the witness testified as an expert." Rule 1.500(2)(b). Plaintiffs did not disclose Dr. Halloran's publications or prior cases for either physician. *See* App. 139-41 (Exhibits to Plaintiffs' resistance to Defendants' motion in limine, 2/14/2019).

b. The Interrogatory Answer does not satisfy Rule 1.500(2)(c).

Assuming Rule 1.500(2)(c) applies, Plaintiffs did not comply with it.

Plaintiffs Interrogatory Answer states that "Dr. Bekavac will testify as to the standard of care" and will be "asked to comment on the standard of care in the evaluation (imaging and surgery) . . .; the breach of that standard of care; . . . and the cause-and-effect relationship between the breach of the standard of care and any damages." App. 99 (Interrogatory Answer). Yet Dr. Bekavac's opinions on these subjects are not set forth in the Interrogatory Answer. *Id.*

As to Dr. Halloran, Plaintiffs described that he would "be asked to comment on the standard of care . . . , and the cause-and-effect relationship between the breach . . . and any damages." App. 100 (*Id.*). Nowhere in the Interrogatory

Answer are such opinions set forth. *Id.* Nor is there any mention of Dr. Halloran's methods in interpreting the angiogram. *Id.*

Plaintiffs' Interrogatory Answer essentially only identifies the above subject matter of expected testimony. Rule 1.500(2)(c) requires more—it requires a summary of opinions. In the motion in limine hearing, Plaintiffs represented that Drs. Bekavac and Halloran "will have testimony regarding what the standard of care would be"—consistent with the fact the actual opinions *had yet* to be disclosed. Limine hearing 2/18/2019, 22:11-13.

4. Plaintiffs cannot cure their non-disclosure with the district court's references to disclosure.

Faced with a disclosure problem, Plaintiffs argue that the district court essentially solved it by finding disclosure was appropriate. Plaintiffs' entire argument is essentially dependent upon their position that the district found full and adequate disclosure--thereby precluding any exclusion of evidence. But the district court's discussion of Plaintiffs' disclosure cannot be read to mean it found that Plaintiffs adequately disclosed Drs. Bekavac and Halloran to testify for any and all purposes and as to any and all opinions. Indeed, the issue was only before the court because there were no signed expert reports.

Prior to any ruling by the court, the defense position was explained:

> . . . what we have asked in Motion in Limine is for Dr. Bekavac to be limited to the scope of his role in this case as a treating physician. It's perfectly acceptable for him to talk about any care and treatment he

> provided to Mr. McGrew, and that is all within that scope, but to the extent he wants to retroactively comment on an imaging study that was done or decisions that were made by Dr. [Otoadese] prior to [Dr. Bekavac's] involvement, they are no longer thoughts and opinions created for the purpose of treatment.
>
> And under *Hansen*, in that vain, we were entitled to a written opinion from the expert identifying those opinions, if any.

Day 1, 10:24-11:10.

Plaintiffs identify three occasions where the district court purportedly held the physicians were "properly designated" and their opinions "appropriately disclosed . . . as required by [Rule] 1.500(2)." Plaintiffs' brief at 27. A review of the record does not support Plaintiffs' characterization of the scope and finality of the district court's discussion of disclosure.

The first reference identified by Plaintiffs is where the court responded to Plaintiffs' argument that they identified the physicians by stating there was "full disclosure." Day 1, 41:10-20. There is no indication the district court was addressing anything other than the fact Plaintiffs designated the physicians in their Iowa Code §668.11 designation--which has never been disputed. There was no discussion of opinions.

The second reference identified by Plaintiffs is soon thereafter and follows an argument by defense counsel that there was no disclosure of standard of care opinions for either physician. Day 1, 44:23-24 (as to Dr. Bekavac, standard of care opinions "clearly aren't in his notes"); *id.* 45:15-16 (as to Dr. Halloran, "he hasn't

talked about standard of care in that [radiology] overread"). When Plaintiffs' counsel argued that the defense was "again" talking about disclosure, the district court indicated it was not "hung up on the disclosure at this point." *Id.* 45:24-46:3. The court went on to state "everybody had what everybody had" and there was no surprise unless it pertains to "the cutting of what Dr. Bekavac said." *Id.* 46:10-14.

A fair reading of the entire discussion does not support that the district court was making a firm ruling that the physicians had been fully disclosed in compliance with all applicable law and could testify for all purposes and to all opinions. In fact, in addition to acknowledging the obvious lack of clarity in the meaning of "what Dr. Bekavac said," the court said:

> . . . And I want everybody to realize, I'm sort of talking out loud here. Okay, I'm not saying I'm going to rule one way or the other. I mean, I'm having a legal discourse . . .

Id. 46:14-16, *id.* 46:18-47:11 (continuing to express concern on standard of care opinions).

In the third and final occasion cited by Plaintiffs, the court provided its ruling before the parties' opening statements. First, the court found that:

> . . . We really just have this note, and that's it, and we don't know exactly, precisely what [Dr. Bekavac's] going to say or how his testimony might be developed . . .
>
> I do think that Dr. Bekavac's testimony would best be explored through an offer of proof . . .

Day 2, 4:12-19. Given the above, the court's later comment about disclosure must be interpreted in the context of the court's finding that Dr. Bekavac's opinions were nearly completely unknown.

As to whether the physicians were disclosed the court stated:

> . . . I do not believe 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] 1.500(2)(b). . . .

Day 2, 7:14-18. All the court was saying is the physicians were designated under §668.11 (not an issue in this case) and a written report was not required in the context of the rule language. The court does not address Rule 1.500(2)(c) or state that *Hansen* does not require more or different disclosure. As explained above, *Hansen* discusses that expert disclosure rules apply when treating physicians act in a role analogous to a retained expert.

Moreover, the district court was well aware of Dr. Otoadese's position. *See* Day 1, 10:24-11:10 (defense argument); App. 228 (Order, 12/8/2019, citing Dr. Otoadese's position that "Plaintiffs never provided signed expert reports for either physician.").

Finally, Plaintiffs' argument that they fully disclosed the opinions of Drs. Bekavac and Halloran must be viewed in the context that the district court was aware that Plaintiffs themselves did not know how the physicians would testify. In

response to a question from the district court as to what the physicians would testify about, Plaintiffs' counsel responded:

> . . . I have no access to these folks other than Dr. Halloran has a lawyer, and he's already prepared his report [Court Exhibit 2]. Dr. Bekavac is --has indicated that in his report [Court Exhibit 1], what he's gonna testify to, he's not--you know, I had to subpoena him . . .

Day 1, 17:18-18:1.[25] As defense counsel responded at trial:

> . . . Dr. Diaz has repeatedly said he doesn't have access to these people. Well, heaven sakes, if he doesn't have access to them, I certainly don't. And it's [counsel's] words . . . that they're going to testify to standard of care and causation and breaches.
> . . .
> [Dr. Diaz] has repeatedly argued verbally and in writing that these witnesses are gonna talk about standard of care, breaches of standard of care. That's nowhere in the hearsay documents we have from [the physicians.]"

Id 19:7-13; 38:1-4.

5. The evidence (and related argument) was also properly excluded under Rule of Evidence 5.403.

The district court stated that presenting the treating physicians' opinions as requested by Plaintiffs under the circumstances would be confusing and misleading to the jury and prejudicial to the defense because the evidence concerned a central issue in the case. *See* Day 1, 33:13-34:9; *see id* Day 1, 44:23-45:7 (defense argument). This alternative grounds supports the district court's ruling. *See* Iowa

[25] *See also* Day 1, 15:10-11 (Plaintiffs' counsel: "I certainly couldn't control them. If I wanted to retain them, I wouldn't have been able to retain them."); *id.* 16:10-12 ("we can't control these folks").

R. Evid 5.403 (even probative evidence may be excluded if unfairly prejudicial, confusing, misleading, or cumulative).

Plaintiffs argue that the district court's ruling "distorted" the trial, prevented the jury from "hearing the truth," and allowed a "false narrative" because Plaintiffs were not allowed to argue that Dr. Bekavac criticized Dr. Otoadese. Plaintiffs' brief at 38; *see* Day 5, 173:5-15 (ruling on criticism).Yet it was Plaintiffs who failed to ask Dr. Bekavac during the offer of proof whether he was, in fact, "critical" of Dr. Otoadese or whether he did, in fact, believe Dr. Otoadese violated a standard of care. This is because Plaintiffs did not know what Dr. Bekavac would say and were afraid to ask. Yet Plaintiffs wanted to argue in closing what Dr. Bekavac meant. The district court's rulings did not hide the truth, distort the proceedings, or allow a false narrative. Instead, the district court's rulings prevented unfair prejudice.

Further, arguing that Dr. Bekavac was critical of Dr. Otoadese is a mischaracterization of the only known opinion from Dr. Bekavac on this issue. Dr. Bekavac does not state Dr. Otoadese breached the standard of care or that he was critical of Dr. Otoadese. As discussed above, Dr. Bekavac *disagreed* with Dr. Otoadese--and perhaps only on the determination of stenosis--and explained that physicians are not required to agree. The district court's exclusion, given Plaintiffs' desired spin on the evidence, was not an abuse of discretion.

Dr. Halloran's testimony was also properly excluded under Rule 5.403. His testimony would have been cumulative to Dr. Bekavac's on the percent of stenosis. Day 3, 8:17-24 (defense argument). Any testimony on his "methodology" was relevant, if at all and assuming otherwise admissible, to radiologist Dr. Cammoun. *See* Day 3, 19:10-18 (defense argument). Further, multiple witnesses testified about the methodology used by radiologists. *See* Part IIC; Day 5, 153;12-18 (court).

6. Summary.

Under the above circumstances, the district court worked tirelessly to apply Iowa law to the unique and unusual situation.[26] The court patiently allowed the parties to argue their positions on multiple numerous occasions and allowed unlimited offers of proof. The court reconsidered the issue and its rulings after each argument and offer. Ultimately, the district court allowed, and jury actually heard, each physicians' determination of the percent of stenosis of the carotid artery—the heart of Plaintiffs' case.

[26] Day 1, 32:2-14 (court describing "unusual" circumstances); Day 5, 154:2-24 (court: "this is a bit of an unusual situation").

Plaintiffs have failed to demonstrate the district court's ruling was so untenable and unreasonable under the unusual and complicated proceedings in this case so as to constitute an abuse of discretion.[27]

Moreover, it is—to this day—unknown how these two physicians would testify if asked what standard of care applied to Dr. Otoadese that he purportedly breached. Their opinions were not disclosed or elicited in the offers of proof. Regardless of whether the Court looks to *Hansen*, the Rules of Civil Procedure, or some combination, the law in Iowa cannot be that a plaintiff in a medical malpractice case can be allowed to proceed to trial without disclosing the opinions of their experts. That is what a reversal would endorse.

E. Plaintiffs cannot show prejudice from the Bekavac ruling.

To establish that a new trial is warranted, Plaintiffs must establish not only that the district court abused its discretion but also prejudice. *See Baysinger v. Haney*, 155 N.W.2d 496, 499 (Iowa 1968).

"It is axiomatic that a trial court is better equipped than appellate courts can be to determine whether prejudice occurs." *State v. Anderson*, 448 N.W.2d 32, 34

[27] Plaintiffs' citation to *Lambert v. Sister of Mercy Health Corp*, 369 N.W.2d 417, 421 (Iowa 1985), that excluding an expert should not be done "lightly," is not compelling. There was nothing done "lightly" in this case. In addition, the quoted language from *Lambert* indicates that "limitation of testimony" is an appropriate alternative to exclusion of a witness. Plaintiffs' brief at 27. That is what the district court did.

(Iowa 1989). The district court held that "even if [it] abused its discretion, the substantial rights of the Plaintiffs were not materially affected as a result of the ruling in light of the testimony that was permitted through Dr. Bekavac and the accompanying exhibits, as well as the testimony of the Plaintiffs' retained expert." App. 229 (Order, 12/8/2019).

The degree of carotid artery stenosis was critical evidence in whether surgery was warranted. On this, Plaintiffs' desired evidence was introduced. Dr. Bekavac was allowed to testify that he determined Plaintiff's carotid artery was approximately 40% stenosed, that Dr. Halloran determined 32% stenosis, *and* that his own interpretation was significantly different from Dr. Cammoun's. Day 2, 147:9-148:11, 150:8-20, 155:3-5.

Plaintiffs then effectively connected the dots for the jury with their expert, Dr. Adams, who testified that a carotid endarterectomy was not warranted assuming the percentages determined by Drs. Bekavac and Halloran were accurate. Day 4, 18:18-19:6.

Importantly, Plaintiffs elicited testimony from Dr. Otoadese that if Dr. Bekavac's numbers (32% and 40%) were correct, Plaintiff would not have been a candidate for surgery. Day 4, 89:7-19. In other words, Dr. Otoadese testified in agreement to the opinion excluded from Dr. Bekavac—that 32 or 40% would not justify surgery. Some would argue that Dr. Otoadese's concession on this point

was more probative than if Dr. Bekavac would have been allowed to say essentially the same thing. *See Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984) ("withholding of cumulative testimony will not ordinarily" establish prejudice).

Plaintiffs' treatment of Dr. Bekavac's testimony in closing argument belies their cry of prejudice. Given the evidence allowed from Dr. Bekavac, Plaintiffs was able to argue that it "is Dr. Bekavac that drives this case," why the jury should trust him, how pure and unbiased his opinions were, and how he had no reason (other than implied professional integrity) to testify against his friend. Day 6, 16:6-18, 17:2-3, 30:13-15, 31:15-17, 32:18-23. The only way Plaintiffs could make these arguments is because the district court allowed Dr. Bekavac to testify as to highly probative evidence that was critically important to Plaintiffs' case.[28]

Even in opening statement, based upon the anticipated evidence from Drs. Bekavac and Adams, Plaintiffs were able to state:

> [Dr. Bekavac] says that's not 65 or 70 percent. That's 40 percent. And . . . you're never going to do surgery on somebody that's got 40 percent.

Day 2, 21:16-20.

[28] Plaintiffs complain about defense counsel's closing argument on physician testimony. However, after Plaintiffs' closing argument which focused extensively on Dr. Bekavac and bolstered his credibility and trustworthiness, it is no wonder defense counsel addressed Plaintiffs' experts in the defense closing.

Plaintiffs focus upon the exclusion of their *argument* that Dr. Bekavac was "critical" of Dr. Otoadese. Plaintiffs' brief at 38. This is only argument—not the evidence. As discussed above, Plaintiffs initially agreed at trial that the evidence supported the physicians disagreed—and nothing more. *See* Day 5, 4:13-5:6 ("the way I look at it is I'm gonna be able to argue . . . that [the physicians] disagree with Dr. Otoadese. I think that's the state of the evidence, right? Court: Agreed.").

Even if the statement in Dr. Bekavac's medical report (that 40% stenosis did not justify surgery) had been introduced into evidence, Plaintiffs sought to infer and extrapolate from that statement in unsupportable and prejudicial ways in closing argument. The statement does not, standing alone, support an argument that Dr. Bekavac believed Dr. Otoadese breached the standard of care (Plaintiffs' obvious intended inference).

II. The ruling as to Dr. Halloran does not support a new trial.

A. Introduction, standard of review and error preservation.

Dr. Otoadese incorporates Part I A-C above. While Plaintiffs elicited some testimony in Dr. Halloran's offer of proof about his methodology (discussed below), there was no testimony about the standard of care and breach opinions Plaintiffs sought to introduce.

B. The district court's ruling was well within its discretion.

Other than an argument on prejudice, Plaintiffs make no additional or different argument as to Dr. Halloran that was not previously asserted as to Dr. Bekavac. *See* Plaintiffs' brief 40-42. Dr. Otoadese similarly refers to and incorporates his argument above under Part I D.

Plaintiffs cannot point to any place in the record where Dr. Halloran's opinions are set forth on the applicable standard of care that was allegedly violated by Dr. Otoadese or causation. Further, while Plaintiffs focus on the exclusion of Dr. Halloran's explanation of his methodologies in determining the 32% stenosis, nowhere are such opinions disclosed. App. 12 (Designation); App. 99-100 (Interrogatory Answer).

The district court's exclusion may also be affirmed under Rule 5.403 which permits exclusion of cumulative evidence of marginal probative value. *See* Part IIC below.

As to Plaintiffs' reference to rebuttal, assuming Plaintiffs have adequately raised that issue on appeal, there was no abuse of discretion. At trial, Plaintiffs sought to call Dr. Halloran in rebuttal basically for same purpose as initially. In other words, Plaintiffs were essentially asking the court to reconsider the exclusion of Dr. Halloran. Day 5, 149:9-151:21. Dr. Halloran was not being called to testify on anything new that arose in the defense case--he was not offered for proper rebuttal testimony. *See Carolan v. Hill*, 553 N.W.2d 882, 899 (Iowa 1996) (proper

rebuttal "is that which explains, repels, controverts, or disproves evidence produced by the opposing party" and is generally "confined to new matters first introduced by the opposing party").

C. There was no prejudice.

Plaintiffs were not prejudiced in regards to Dr. Halloran's 32% finding. As the district court noted, Dr. Halloran's "testimony about the percentage of blockage has already come in through Bekavac." Day 5, 155:15-17l; *see also* App. 246 (Trial Exh. 12); *Taylor*, 352 N.W.2d at 687 ("withholding of cumulative testimony will not ordinarily" establish prejudice).

To the extent that Dr. Halloran would have testified about a standard of care or breach, it would be relevant to former Defendant radiologist Dr. Cammoun and would have minimal, if any, probative value as to Dr. Otoadese. Nor can the Court even determine the existence of any prejudice given Dr. Halloran's opinions, if any, are unknown.

Plaintiffs focus on the exclusion of testimony explaining Dr. Halloran's methodology. But Dr. Otoadese is not a radiologist and did not interpret the angiogram as a radiologist. Plaintiffs themselves distinguished the specialties. *See* Day 1, 17:9-14 (counsel to court, describing Plaintiffs' surgical expert: "He's not a radiologist . . . just as Dr. Otoadese did his own sort of eyeball test, [Dr. Adams]

did essentially the same thing"). Plaintiffs were not prejudiced by the exclusion of how a radiologist interprets an image in this case against a surgeon.

During the offer of proof, the testimony from Dr. Halloran about the process consisted of 12-15 lines. Day 3, 11:23-12:12 (explaining he uses computer software which can provide a computer-generated measurement to compare to his own manual measurement).This is all that is before the Court as allegedly causing prejudice. But many other witnesses explained the methods used by radiologists--in as much, if not more, detail.

Dr. Bekavac explained Dr. Halloran's methods which included use of "software which can more accurately measure degree of narrowing" utilizing a mathematical formulas--as contrasted to Dr. Bekavac's "rough estimate." Day 2, 150:19-23, 152:1-12. Dr. Bekavac testified that Dr. Halloran's method was more accurate. *Id.* 156:3-9.

Defense expert Dr. Gebel described his review as "eyeball[ing] it" and, in comparison, the radiologist have "very fancy . . . imaging software and software where they can actually take measurements . . . literally to the nearest tenth of a millimeter." Day 4, 126:10-127:13. He described the radiologist method as "the accurate way to do it." *Id.* 127:7-8; *id.* 165:9-12 (describing he was "eyeballing" the stenosis as he did not "have that kind of software to do . . . a precise measurement" like radiologists).

Defense expert Dr. Levett explained he did not have the same kind of tools and measuring device on the computers that radiologist do but still reviews angiograms himself. Day 5, 126:1-127:3; *see also id.* 40:24-42:16 (Otoadese).

Plaintiffs emphasized to the jury that Dr. Halloran used "special" and "sophisticated" software in arriving at 32%. Day 4, 18:23-24 (during Dr. Adams testimony); *id* 89:11-12 (during Dr. Otoadese testimony).

When considering Plaintiffs request to bring Dr. Halloran back for rebuttal, the district court gave its assessment of Dr. Bekavac's testimony:

> [Dr. Bekavac] testified in some detail even in front of the jury as to what he say of the benefits . . . of having that opinion from Dr. Halloran because of the software and other advanced information that Dr. Halloran would have in making that [percent of stenosis] determination. All of that's come in before the jury. The Plaintiff had the opportunity to get that in through Dr. Bekavac. . . .

Day 5, 153:12-18. There was no prejudice.

III. The district court did not abuse its discretion in excluding prejudicial evidence relating to Dr. Otoadese's background.

A. Standard of review.

Evidentiary issues are reviewed for an abuse of discretion. "The trial court has discretion to exclude relevant evidence when 'its probative value is substantially outweighed by the danger of unfair prejudice.'" *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 158 (Iowa 2004) (emphasis removed); *id.* at 159 ("We do not think the trial court abused its discretion in making that judgment call here,"

affirming exclusion of tortfeasor's intoxication as "marginally relevant at best" but tending to influence the jury to punish); *see also Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa Ct. App. 1998) ("'We will not find an abuse of discretion in the trial court's admission or exclusion of evidence unless its action is clearly unreasonable.'").

B. Error preservation.

Plaintiffs argue they should have been allowed to introduce evidence that Dr. Otoadese "surrendered his hospital privileges to perform heart surgery" and "then filed suit" against the hospital, reaching a settlement. Plaintiffs' brief at 48; *see also id* at 50 (arguing Dr. Otoadese had been told by hospital he was not allowed to perform surgery). But at trial Plaintiffs agreed not to introduce evidence on hospital privileges and lawsuits:

> The Court: Well, and again, to the extent that I wasn't clear, I don't think that that's [the Allen Hospital privilege allegations are] admissible either. Again, I think it can be explored that he used to do that [open heart surgery]; that it was a large percentage of his practice, he stopped doing it six or seven years ago; that now his practice is more made up of doing something else, again, what the nature of the practice was.
>
> Mr. Diaz: Right, and *I think that's what I indicated I was willing to do, Your Honor.*

Day 5, 11:16-24 (emphasis added); *see also id*. 8:9-11; 20:1-11 (Plaintiffs' agreement that references to other lawsuits, including one with Allen Hospital involving privileges, would not be introduced).

Plaintiffs waived any complaint about the evidence concerning Dr. Otoadese's change in hospital privileges at Allen Hospital and lawsuits. *See IBP, Inc. v. Al-Gharib,* 604 N.W.2d 621, 628 (Iowa 2000) (discussing when appealing party waives issue by position taken in district court).[29]

C. The district court did not abuse its discretion.

1. Relevant proceedings.

Plaintiffs sought to introduce excerpts of Dr. Otoadese's deposition. App. 169-71 (Designation of Deposition, 2/15/19). Dr. Otoadese's entire deposition was provided to the district court. App. 44-91 (Defendants' motion in limine Exh. 4 ("Deposition").[30]

Plaintiffs sought to introduce that Dr. Otoadese was "kicked out," "fired," or terminated from Cedar Valley Medical Specialists. App. 49, 51 (Deposition 14:13-17, 22:10-15; 23:11-16). Dr. Otoadese explained that the event included a patient lawsuit, settlement out of court, and a decision that he was performing high-risk procedures and was not insurable. App. 51 (Deposition 22:10-23:7). Dr. Otoadese objected to the subject matter under Iowa Rules of Evidence 5.402, 5.403,

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[29] In addition, Plaintiffs themselves sought exclusion of other litigation under Rules 5.401, 5.403, and 5 404 in their own motion in limine. App. 102-03 (Plaintiff's First Motion in Limine ¶4, 2/12/2019).

[30]Relevant here, Plaintiffs designated deposition pages 11:21-22:15 and 23:8-24:18. App. 169-70.

5.404(b), 5.408, 5.411, and 5.802. App. 182-83 (Objections to designation, 2/15/19); App. 33-43 (Motion in Limine ¶¶4-6, 9, 12, 2/12/19). The district court excluded the subject matter at trial, though Dr. Otoadese's change in practice settings over the course of his career was introduced. Day 5, 9:10-19.[31]

Plaintiffs also sought to introduce that Dr. Otoadese was allegedly forced to give up his cardiac surgery privileges at Allen Hospital. App. 50 (Deposition 16:10-20, 17:10-15).[32] Dr. Otoadese explained that it was "political," "even resulted in a lawsuit and was settled out of court," was not "straightforward," and his ceasing to do open heart surgery was "negotiated." App. 50 (Deposition 16:4-18:25). Dr. Otoadese objected to this evidence under Rules 5.402, 5.403, 5.404(b), 5.408, 5.802, and as involving peer review. App. 182-83 (Objections to designation); App. 33-43 (Motion in Limine ¶¶4-6, 9, 12). As discussed above, Plaintiffs agreed not to introduce evidence about privileges and lawsuits. Day 5,

[31] Judge Stigler, who heard the parties' arguments at a pre-trial limine hearing, indicated his strong inclination to also exclude it. Limine hearing 2/18/2019, 46:5-10 ("I don't want to drag this thing into the mud as to why [Dr. Otoadese] no longer is with Cedar Valley Medical Specialists); *id* 51:5-7 (discussing same: "I do right now believe that you have a point that it's unfairly prejudicial when compared to the marginal probative value").

[32] Plaintiffs also deposed defense expert Dr. Levett on this subject as Dr. Levett served as an expert for Allen hospital. *See* App. 190-91 (Plaintiffs' resistance to objections, 2/17/19); Day 5, 19:25-20:11.

8:9-11, 11:16-24, 20:1-11.[33] The court allowed testimony on Dr. Otoadese's prior cardiac surgery practice, when he stopped, and the changes in his practice since. Day 5, 11:16-22. There was essentially nothing excluded that was not voluntarily excluded.[34]

Plaintiffs' suggestion that their spin on the facts is undisputed is simply wrong. The events giving rise to the evidence were so disputed that they involved lawsuits and settlements.[35] In his deposition, Dr. Otoadese repeatedly refused to concede Plaintiffs' characterization that he surrendered his privileges "at the insistence of the hospital." App. 50 (Deposition 16:10-22, 17:10-22).

2. There are multiple grounds to affirm the court's discretionary ruling.

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[33] While Plaintiffs agreed not to attempt to introduce privilege issues, they persisted in attempting to introduce there was a "restriction" on Dr. Otoadese's practice. *See* Day 5, 8:9-10, 12:1-22.

[34] Judge Stigler indicated prior to trial his inclination to exclude this evidence as well. Limine hearing 2/18/2019, 46:5-10 (J. Stigler: "I don't want to drag this thing into the mud as to why [Dr. Otoadese is] . . . no longer practicing open heart surgery); *id* 51:5-7.

[35] At trial, defense counsel explained: "the facts are different than what Mr. Diaz has characterized. There was a business dispute between Dr. [Otoadese] and Allen Hospital which was negotiated. It was a complex dispute negotiated between the two of them. Part of . . .that involved Dr. [Otoadese] giving up his privileges to do open heart surgeries. . . . it's completely collateral, and if there's some argument made that suggests that was stripped of privileges or they were taken away or he was in bad standing, that's absolutely not true." Day 5, 11:6-15.

The above subjects were properly excluded. They are completely irrelevant to the issues the jury decided, were unsupported by Plaintiffs' expert as in anyway connected to the alleged medical negligence, and would have been incurably prejudicial to Dr. Otoadese. They are collateral issues that would have been a waste of the court and jury's time and created suspicions, doubts, and potential hostilities towards Dr. Otoadese. Further, the only way Dr. Otoadese could adequately respond to the evidence would have only compounded the prejudice and required introduction of subjects otherwise inadmissible such as other litigation, settlements, liability insurance, and peer review issues. Even if minimally probative (which Dr. Otoadese does not concede), the likelihood of unfair prejudice far exceeded the probative value of the evidence.

Post-trial, the district court held:

> . . .The various evidence offered by the Plaintiffs concerning the ending of the relationship between Dr. Otoadese and Cedar Valley Medical Specialists, as well as Dr. Otoadese's privileges was not relevant to the issues to be decided by the jury in the present case and further, even if relevant, had prejudicial effect that far exceeded any probative value that evidence might provide.

App. 230 (Order, 12/8/2019).

Rule 5.402. The subjects were not relevant to any issue the jury was asked to decide. The issues pre-date the care at issue and Plaintiffs' medical expert did not suggest the issues were in any way relevant to this case or Dr. Otoadese's qualifications. This case did not involve heart surgery or hospital privileges.

Rule 5. 403. [36] Any possible probative value of this evidence was substantially outweighed by the unfair prejudice to Dr. Otoadese. *See Johnson v. Behrle*, 2002 WL 1334727 *2 (Iowa Ct. App. 2002) (affirming trial court's exclusion of evidence of other disputes that were not at issue in present case, on basis that any probative value of the evidence was outweighed by the danger of unfair prejudice); *State v. Henderson*, 696 N.W.2d 5, 10-11 (Iowa 2005) (evidence is unfairly prejudicial when it "'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case'").

The evidence was even more certain to cause prejudice because it was in the context of a hospital allegedly restricting a physician's practice and an employer "kicking" a physician out over a patient lawsuit, complication, and liability insurance.[37] *See King v. Ahrens*, 16 F.3d 265, 269-70 (8th Cir. 1994) (affirming

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[36] Rule 5.403 provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

[37] App. 51 (Deposition 22:10-23:7, "There was a lawsuit. A patient developed a foot droop from vein surgery . . . the lawsuit was settled out of court, and the Cedar

exclusion of evidence offered on defendant's credibility which included that defendant's medical license had been suspended; finding the "danger of unfair prejudice is substantial and immediately apparent" as the evidence "by its very nature reflects badly" on the physician); *Cawthorne v. Catholic Health Initiatives*, 743 N.W.2d 525, 528 (Iowa 2007) (impact of improper admission of examining board investigative information was "so great" as to require a new trial).

The admission of such evidence would also have resulted in waste of time on collateral issues, caused undue delay, and misled the jury. *See* Limine hearing 2/18/2019, 48:23-49:2 (defense counsel explaining: "the business ins and outs of the dissolution of the relationship with Cedar Valley could take us a week in and of itself to explain to the jury"); *Firemen's Fund v. Thien*, 63 F.3d 754, 758-59 (8th Cir. 1995) (evidence would require "extended, and irrelevant, litigation [on the collateral issue], and thus would confuse the jury and waste their time and the court's"); *Coast–to-Coast Stores, Inc. v. Womack-Bowers, Inc.*, 818 F.2d 1398, 1404 (8th Cir. 1987)(agreeing that if "other acts" were admitted, the defendant would have the right "to introduce rebuttal evidence . . . confusing the issues and wasting the time of the court and jury.").

Valley organization decided that I was doing high-risk procedures and I was not insurable, and that was what led to that").

Rule 5.404(b).[38] Under Rule 5.404(b), a party typically cannot introduce character evidence or evidence of other wrongs or acts to prove that a person acted in conformity therewith. That Plaintiffs sought to use the evidence in this inflammatory way is made clear in their brief as they argue the evidence shows Dr. Otoadese to be a physician who was "in the spotlight for questionable care" and whose care "threaten[ed] the health and safety of his patients."

In *State v. Henderson*, 696 N.W.2d 5 (Iowa 2005), the Court reversed a conviction based on the prejudice caused by the admission of prior acts. While the majority affirmed that a prior marijuana conviction was relevant, the Court still held the district court abused its discretion in admitting the evidence as it was too prejudicial. *Id*. at 11-12.

The following factors apply to the analysis of the admission of other act evidence:

> "(1) the actual need for the evidence in view of the issues and other available evidence,

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[38] Rule 5.404(b) provides:

> (1) *Prohibited use.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted uses.* This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(2) whether there is clear proof showing the other [acts] were committed by the accused,
(3) the strength or weakness of the prior-acts evidence in supporting the issue sought to be proven, and
(4) the degree to which the jury will probably be improperly influenced by the evidence."

696 N.W.2d at 11.[39]

As to factor (1), there was *no* need for the evidence Plaintiffs sought to introduce. Plaintiffs asserted a medical malpractice claim concerning the care and treatment provided to Plaintiff. The other controversies were not matters the jury decided.

As to factor (2), the subjects Plaintiffs sought to introduce lack "clear proof" of *anything.* As made clear in Dr. Otoadese's deposition, the incidents were "political" and involved litigation, settlements, and negotiations.

As to factor (3), the evidence sought to be admitted does not concern Dr. Otoadese's care and treatment and it was not probative on the issues.

As to factor (4), as in *Henderson*, the "degree to which the jury will probably be improperly influenced" compelled exclusion:

> When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered: to suggest that the defendant is a bad person . . . and that if he did it before he probably did it again.

[39] The *Henderson* Court found the second and third factors supported admission in that case and *still* found the evidence should not have been introduced. *Id*.

Id. at 12 (citation and internal quotations omitted); *see also id*. at 14 (J. Lavorato, concurring*)("a defendant must be tried for what he did, not for who he is."*)(citations and internal quotations omitted) (emphasis added). Plaintiffs clearly desired to paint Dr. Otoadese as a "bad" physician who, if he acted questionably and unsafely before, he probably did so again when treating Plaintiff.

Insurance and settlement information. The subjects Plaintiffs sought to introduce involved other litigation that was settled and a dispute arising out of the inability to obtain liability insurance. These subjects are generally inadmissible. *See* Rules 5.408, 5.411. Regardless of Plaintiffs' agreement to limit their evidence, Dr. Otoadese would have been prejudiced. In order to adequately respond to, and rebut, the evidence, Dr. Otoadese would have been forced to introduce prejudicial subjects to provide an explanation of the disputes.

Hearsay (Rule 5. 802). The subject matter involved inadmissible hearsay, including purported nonverbal conduct by Cedar Valley Specialists and Allen Hospital.[40] That the subjects were in Dr. Otoadese's deposition does not cure the hearsay problem. First, even admissions are subject to Rule 5. 403. *See State v.*

[40] Hearsay in Plaintiffs' deposition designations included: the conduct of Cedar Valley Specialists of terminating, firing, or "kicking Dr. Otoadese out" (App. 49-51, Deposition at 14:13-17, 23:11-16) and Allen Hospital's alleged "insistence" that Dr. Otoadese give up his privileges for open heart surgery or that it "told" him to (*id.* 16:17-19, 17:11-21). *See* App. 183 (Dr. Otoadese's objections).

Willis, 2000 WL 702396 at *2, n. 2 (Iowa Ct. App. 2000) (even if statements are admissible as "admissions," they may still be excluded under Rule 5.403).

Further, the alleged conduct by Cedar Valley Specialists and Allen Hospital were not admissions by Dr. Otoadese. This was hearsay within hearsay. *See* Rule 5.805; *see also Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 182 (Iowa 2004) *(*"If the hearsay statement must be believed for the evidence to be relevant to the case, then it is being offered for the truth of the matter asserted and is inadmissible hearsay."); *State v. Sowder*, 394 N.W.2d 368, 371-72 (Iowa 1986) (when a hearsay statement is actually admitted as substantive evidence, notwithstanding that the proponent argues it was admitted for impeachment, there must be an applicable hearsay exception).

3. Plaintiff's position does not support a new trial.

The vast majority of Plaintiffs' argument and authority is based upon admissibility of evidence pertaining to retained experts—not a party. The danger of unfair prejudice when collateral and prejudicial evidence is admitted about a party—whose conduct the jury will be evaluating--is far greater than when admitted about a retained expert. Further, a litigant does *not* have unrestricted freedom to attack the credibility of the adverse party in any way conceivable. Even if evidence could be arguably probative on a party's credibility, that does not mean

such evidence is automatically admissible. Such a position negates many evidentiary rules.

"Impeachment testimony that only goes to a collateral issue is inadmissible." *State v. Jones*, 511 N.W.2d 400, 406 (Iowa Ct. App. 1993) (trial court did not abuse discretion in excluding evidence, "None of these matters were relevant to defendant's trial."); *State v. Goeders*, 423 N.W.2d 901, 904 (Iowa Ct. App. 1988) (trial court did not abuse its discretion in excluding evidence, even though it was argued to impeach her credibility, as it "was not relevant to this case."); *State v. Smith*, 522 N.W.2d 591, 592-93 (Iowa 1994) (affirming exclusion of impeaching evidence probative on truthfulness that was too prejudicial); *see also State v. Cejvanovic*, 2004 WL 357883 *3 (Iowa Ct. App. 2004) (affirming exclusion that witness used false papers to obtain employment because "any relevance it had concerning her credibility was far outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury.").

Plaintiffs' position--that everything is admissible if a defendant testifies on their own behalf--would essentially deny defendants the ability to fully defend a case for fear of introduction of any and all remote, collateral and prejudicial evidence. Further, Plaintiffs' argument that Dr. Otoadese chose to take the stand is misguided. Plaintiffs sought to introduce the evidence by deposition. App. 169-71 (Designations); Rule of Civil Procedure 1.704 (2).

The Iowa cases cited by Plaintiffs are not persuasive. *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882 (Iowa 1994), did not concern the introduction of collateral subjects to impeach the credibility of a defendant. *Andersen v. Khanna,* 913 N.W.2d 526 (Iowa 2018) addressed an informed consent claim arising out of a physician's experience. That was not the informed consent claim in this case and *Andersen* did not concern the admissibility of unrelated litigation and disputes.

D. There was no prejudice or constitutional violation.

Plaintiffs had more than a fair opportunity to present their case and cannot show they were prejudiced by exclusion of collateral evidence. Plaintiffs were not prejudiced.

Plaintiffs introduced no evidence from their expert Dr. Adams (or any other witness) that Dr. Otoadese was not qualified or that he should not be performing carotid endarterectomies.

As to the Allen Hospital issue and the change in Dr. Otoadese's practice, Plaintiffs were allowed to (and did) introduce evidence that his practice previously was 50-60% open heart surgery, which he ceased performing in 2009. Day 5, 100:15-101:22. And, importantly, Plaintiffs *agreed* to limit their evidence to this. Plaintiffs cannot establish prejudice when they agreed to limit the evidence.

That leaves the only evidence at issue as Dr. Otoadese's departure from Cedar Valley. Given the circumstances of that event, it is exceedingly difficult to see *any* probative value in the evidence--certainly none that could overcome the problems it would have created.

Assuming without conceding a due process argument has been preserved, Plaintiffs were not denied due process. Due process requires fundamental fairness, including notice and the opportunity to meaningfully participate. *See Aluminum Co. of Am. v. Musal*, 622 N.W.2d 476, 479 (Iowa 2001) ("our benchmark is fundamental fairness"); *In re Marriage of Seyler*, 559 N.W.2d 7, 9 (Iowa 1997) (due process requires parties be "given a meaningful opportunity to be heard," including "at a meaningful time and in a meaningful manner.") (internal quotations and citations omitted). Plaintiffs were not denied due process.

Conclusion

For the reasons set forth above, Dr. Otoadese respectfully requests that the Court affirm the district court on all issues and deny Plaintiffs' request for a new trial.

Oral Argument Statement

Dr. Otoadese believes this case could be affirmed without oral argument. If argument is granted, he requests to be heard.

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