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' APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

I. In affirming a defense verdict in a medical negligence case, did the Court of Appeals correctly state and apply the new rules for disclosure of proposed expert witness testimony set forth in Iowa R. Civ Pro. 1.500(2) when it concluded ---in direct contradiction to the Trial Court's conclusion-- that the "McGrews did not provide adequate disclosure of the nature of the doctors' expert opinions"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT SUPPORTING FURTHER REVIEW

When this Court established the Civil Justice Task Force in 2009, the Task Force could not come to an agreement on changes to the expert disclosure requirements of the Iowa Rules of Civil Procedure. *Reforming the Iowa Civil Justice System*: *Report of the Iowa Civil Justice Reform Task Force, January 30, 2012*, p. 40 ("The Task Force compared the federal approach to disclosure of expert witnesses with the current Iowa procedure but was unable to reach a consensus on possible changes to Iowa's procedure for expert witness opinion disclosure or the taking of expert depositions.")

When, on August 28, 2014, this court issued its order in response to the Task Force recommendations, it established a new expert disclosure process found at Iowa R. Civ. Pro. 1.500(2). The new rules went into effect starting in 2015. It appears that this Court implemented rules similar to if not identical to Federal R. Civ. Pro. 26(a)(2). The fundamental purpose of Iowa R.Civ. Pro. 1.500(2) is to assure disclosure to avoid surprise.

The McGrews filed a petition on July 29, 2016. (App. 5). They accused Dr. Otoadese, a Waterloo vascular surgeon, of performing an unnecessary surgery on Mr. McGrew that led to a catastrophically debilitating stroke. When the McGrews filed and prosecuted their lawsuit, they faithfully

followed these rules. At the inception of litigation, and at every opportunity, the McGrews identified two local physicians (Dr. Ivo Bekavac and Dr. John Halloran) who would testify to certain opinions that they developed outside of the litigation process, including the proposed testimony of Dr. Bekavac, that Dr. Otoadese performed an unnecessary surgery.

The Trial Court determined on the record that the McGrews adequately disclosed the anticipated testimony of these local physicians. The Trial Court stated that no one was surprised by the anticipated testimony of these local physicians. Yet, despite faithfully following the new rules established by this Court with regard to expert disclosures, the Trial Court excluded the crucial testimony of these experts.

Despite following the new rules established by this Court with regard to expert disclosures, the Court of Appeals, in contradiction of the Trial Court's on the record statements, concluded that "the McGrews did not provide adequate disclosure of the nature of the doctors expert opinions." (Court of Appeals Decision, p. 2).

Since the McGrews produced written medical reports from both local physicians and provided a "summary of the facts and opinions" for each expert, it did not matter whether they were deemed retained or not retained

because in either instance the McGrews faithfully complied with Iowa R. Civ. Pro. 1.500(2) and there was no basis to conclude that the McGrews had failed to adequately disclose the anticipated testimony of these physicians.

The ruling of the Trial Court and the decision of the Iowa Court of Appeals contradict the purpose of Iowa R. Civ. Pro. 1.500(2). It is necessary for this court to provide clarification and guidance on how the Trial Courts are to assess the level of disclosure needed to meet each of the requirements set forth in the new rules, including what is expected of physicians who are otherwise providing care and treatment to a party. It is evident from the failure of the task force to agree on numerous issues related to expert testimony that this is an issue that will repeat itself and may have significant consequences on the ability of litigants to develop and prosecute their cases and defenses:

> The Task Force discussed several potential reforms of expert discovery rules. Limitation of the number of expert witnesses, restriction of experts' testimony to the contents of their reports, and acceleration of disclosure requirements were thoughtfully considered. In the end, the members reached no consensus in support of such changes because of the perceived risk that *the changes would unreasonably restrict litigants' ability to develop their claims and defenses*.

Reforming the Iowa Civil Justice System: *Report of the Iowa Civil Justice Reform Task Force, January 30, 2012*, pp. 39-40 (emphasis added)

While Trial Courts have broad discretion with regard to the admissibility of expert testimony, no court has the discretion to misapply the

Iowa Rules of Civil Procedure. *Reis v. Iowa Dist. Court for Polk County*, 787 N.W.2d 61, 66 (Iowa 2010) ("[W]e review interpretation of our rules of civil procedure for errors at law"). The McGrews contend that the Court of Appeals' decision is in conflict with the language and spirit of this Court's new rules with regard to expert disclosure and this case presents an opportunity for this court to provide a clear roadmap for how Trial Courts and Appellate Courts should resolve disputes regarding expert disclosures. Iowa R. App. P. 6.1103(1)(b)(1), (2) and (3).

The McGrews respectfully request that this Court accept further review and conclude that they faithfully complied with the expert disclosure requirements and that these two local physicians should have been permitted to testify to the opinions fully disclosed in the petition, the designation of experts, the medical reports, and the supplemental answer to interrogatory.

BRIEF IN SUPPORT OF FURTHER REVIEW

STATEMENT OF THE FACTS[1]

The McGrews disclosure of the anticipated testimony of these two local physicians began with the petition, which outlined the evidence to be provided by these two local physicians. (App. 7-8, ¶s22-26). It was followed by their designation of experts, which included these two local physicians and indicated that both local doctors would testify to the standard of care and any breach of the standard of care. (App. 11).

The McGrews provided the medical reports of both of these physicians, a medical progress note from Dr. Bekavac, and a radiology report from Dr. Halloran. (App. 253-256). The McGrews then provided a supplemental answer to an interrogatory in which they disclosed "a summary of the facts and opinions to which [these witnesses were] expected to testify" as required by Iowa R. Civ. Pro. 1.500(2). (App. 156-59). Finally, at the request of the defendants, they arranged to have both local physicians deposed, only to have the defendants cancel the depositions.[2] (App. 163-64).

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[1] This statement of facts will focus on the McGrews' effort to disclose the anticipated testimony of these local physicians. For a more thorough discussion of the facts, the McGrews refer the court to their Final Briefs.

[2] At oral argument, defendants conceded that the reason that they canceled the depositions was because they wanted to argue that the McGrews had not properly disclosed these local physicians as expert witnesses.

I. THE COURT OF APPEALS APPLIED THE WRONG ANALYSIS REQUIRED BY THE NEW RULES FOR DISCLOSURE OF PROPOSED EXPERT WITNESS TESTIMONY SET FORTH IN IOWA R. CIV PRO. 1.500(2) WHEN IT CONCLUDED ---IN DIRECT CONTRADICTION TO THE TRIAL COURT'S CONCLUSION-- THAT THE "MCGREWS DID NOT PROVIDE ADEQUATE DISCLOSURE OF THE NATURE OF THE DOCTORS' EXPERT OPINIONS".

In a medical negligence case, "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.

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. Iowa has long been "committed to a

liberal rule on admissibility of expert testimony." *Carolan v. Hill*, 553 N.W.2d 882, 888 (Iowa 1996). "Exclusion of an expert as a witness is the most severe sanction and should not be imposed lightly. . .." *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417, 421 (Iowa 1985)[3] ("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." *Id* at 421).

Initially, and most importantly, the Trial Court found that the McGrews properly designated Drs. Bekavac and Halloran in the designation of experts and appropriately disclosed the 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. (App. 11). It is also supported by the McGrews' disclosures set forth in its resistance to Dr. Otoadese's motion in limine. (App. 105, 110-118, 129-164).

[3] 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).

Notwithstanding that finding, the Trial Court and the Court of Appeals relied on *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476 (Iowa 2004) to limit or exclude their testimony. (App. 227, 229; Decision, p. 6)). The Trial Court's ruling was premised on Dr. Bekavac's status as a treating physician and incorrectly interpreted *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. (Trial Day #2, Tr. p. 5, L. 17 – p. 7, L. 7).

The Court of Appeals also concluded that the proposed opinions of the local physicians "did not arise from treating McGrew" and concluded that "they were not treating physicians" and "could not testify as treating physicians." (Decision, p. 6).

But Iowa R. Civ. Pro. 1.500(2) does not focus on whether someone is a treating physician or not; it focuses only on whether they were retained or specially employed to provide expert testimony. Dr. Bekavac was evaluating and treating Mr. McGrew when he wrote in his progress note "40% of stenosis was not significant to justify endarterectomy in my opinion." (App. 254). At the time that he made this statement, there was no lawsuit on file and counsel was not retained. Further, at no time thereafter did Dr. Bekavac contend or assert that he had been retained or specially employed for the

purpose of this litigation. All Dr. Bekavac did was offer an opinion in a progress note that, in his medical opinion, surgery was not justified.

But more importantly, the distinction of whether he was retained or specially employed as opposed to a non-retained expert witness, while important for future litigants, and worthy of significant discussion, does not alter the fact that Dr. Bekavac's report stating that opinion was produced during the course of discovery, was referred to and outlined in a supplemental interrogatory setting forth a summary of facts and opinions that he would testify to (App. 158), was marked as an Exhibit for purposes of trial (App. 246), was marked as a Court Exhibit when the court refused to allow Dr. Bekavac to testify (App. 253) and was deemed by the Trial Court to have constituted fair disclosure to the defendant (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).

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 was retained as an expert witness. But regardless of what label one puts on them, the McGrews focused on assuring full disclosure. That is why they were identified in the petition, in the designation of experts, in medical records, and supplemental interrogatory answers. The supplemental answers

disclosed the opinions of Drs. Bekavac and Halloran and offered availability for depositions.

Yet, despite overwhelming transparency, and a lack of prejudice to the Defendants, the Trial Court and Court of Appeals erroneously focused on the local physicians' status as treating care providers rather than the fact that they had been fully disclosed as expert witnesses. Both Courts overlook 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 and Court of Appeals correctly determined that Drs. Bekavac and Halloran were not treating physicians at any point in time,[4] or for any specific opinion, *Hansen* does not

[4] Whether these local physicians were retained or specially employed may be worthy of discussion on further review and may aid future litigants in determining how and to what extent to disclose anticipated testimony, but it is not crucial to the resolution of this appeal. Regardless of what you call these two experts, the Trial Court concluded that their opinions had been disclosed and no surprise had occurred.

provide support for the proposition that the Trial Court can prevent these experts from testifying. [5]

Where the Trial Court acknowledged full disclosure under both Iowa Code §668.11 and Iowa R. Civ. P. 1.500(2), the court nevertheless 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.").

Finally, the Court of Appeals cited to *Sherrick* v. *Obstetrics* & *Gynecology Specialists, P.C.,* 2018 Iowa App. LEXIS 1005 (Iowa Ct. App. 2018) for the proposition that "a physician's opinion was inadmissible because it did not relate to the care provided to the plaintiff." (Decision, p. 6). However, in *Sherrick,* the plaintiff "did not certify her as an expert witness under Iowa Code section 668.11." *Id* at *8. The Court of Appeals

[5] 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).

concluded that "the treating physician's opinion on the standard of care was expert testimony, **and thus improper absent compliance with the required disclosures**." *Sherrick* at *10 (emphasis added)

CONCLUSION

The McGrews did everything they could to comply with Iowa R. Civ. Pro. 1.500(2). The Trial Court concluded that no one had been surprised and that full disclosure had been made regarding the proposed testimony of these two local physicians. Yet, the Court of Appeals affirmed on a factual matter unsupported by the record.

This Court should accept further review and correct this injustice.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned certifies a copy of this Application for Further Review 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____

CERTIFICATE OF COST

I further certify that because of use of EDMS, there was no cost associated with the printing and reproduction of this Application for Further Review.

_____/s/ Martin A. Diaz__

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This Application for Further Review complies with the typeface requirements and type-volume limitation of 6.1103(4) because:

> This application has been prepared in a proportionally spaced typeface using Times New Roman in Font Size 14 and contains 2,709 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)(a).

_____/s/ Martin A. Diaz__

IN THE COURT OF APPEALS OF IOWA

No. 19-2137
Filed March 3, 2021

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, Kellyann M. Lekar, Judge.

Plaintiffs appeal the jury's verdict for defendants in their medical malpractice action. **AFFIRMED.**

Martin Diaz, Swisher, for appellants.

Nancy J. Penner, Jennifer E. Rinden, and Vincent S. Geis of Shuttleworth & Ingersoll, Cedar Rapids, for appellees.

Heard by Mullins, P.J., and May and Schumacher, JJ.

SCHUMACHER, Judge.

William McGrew and his wife, Elaine McGrew,[1] appeal a jury verdict for Dr. Eromosele Otoadese and Northern Iowa Cardiovascular and Thoracic Surgery Clinic, P.C.,[2] in their medical malpractice action. Because the rules of civil procedure require the disclosure of expert opinions, we conclude the district court did not abuse its discretion by ruling a physician could only testify concerning his treatment of McGrew and not to matters arising before he began treating him. Also, the district court did not abuse its discretion by ruling another physician could not testify in the case, as he did not provide any direct treatment to McGrew. The McGrews did not provide adequate disclosure of the nature of the doctors' expert opinions. We determine the court did not abuse its discretion by ruling the McGrews could not present evidence of Dr. Otoadese's past relationships with a hospital or medical clinic, as the evidence was more prejudicial than probative. We affirm the decision of the district court.

I. Background Facts & Proceedings

McGrew, who was sixty-nine years old, experienced transient vision problems in his right eye. His ophthalmologist believed the problems could be caused by a cataract but wanted to rule out a vascular cause for the symptoms. McGrew had a bilateral carotid duplex ultrasound, which was inconclusive. McGrew's primary care physician, Dr. John Musgrave, referred him to Dr. Otoadese, who ordered a CT angiogram. Dr. Driss Cammoun interpreted the CT

[1] We will refer to William McGrew individually as McGrew and to McGrew and his wife together as the McGrews.
[2] We will refer to Dr. Otoadese and Northern Iowa Cardiovascular and Thoracic Surgery Clinic, P.C. together as Dr. Otoadese.

angiogram as showing a sixty-five percent stenosis of the right internal carotid artery. Dr. Otoadese interpreted the CT angiogram as showing a severe, at least seventy percent stenosis of the right carotid artery. Based on these interpretations of the CT angiogram, Dr. Otoadese recommended a right carotid endarterectomy to remove plaque from McGrew's right carotid artery, and McGrew agreed to the surgery.

Dr. Otoadese performed the right carotid endarterectomy on September 2, 2014. Following the procedure, McGrew suffered a stroke, resulting in a facial droop and weakness on his left side. The next day, Dr. Otoadese performed a second surgery, but McGrew's condition did not improve.

On September 26, McGrew was seen by Dr. Ivo Bekavac, a neurologist, for a second opinion regarding his condition. Dr. Bekavac concluded the CT angiogram did not show sufficient carotid stenosis for surgery to be recommended. He stated the CT angiogram showed stenosis of approximately forty percent. Dr. Bekavac also concluded the second surgery was not medically indicated, as McGrew had suffered a stroke more than eight hours before the surgery. Dr. Bekavac had no relationship with McGrew prior to the stroke but provided continuing treatment after the stroke occurred.

Dr. Bekavac asked Dr. John Halloran, a radiologist, for his opinion. Dr. Halloran agreed the CT angiogram did not show a sufficient degree of carotid stenosis to recommend a right carotid endarterectomy. Dr. Halloran found the CT angiogram showed McGrew's right carotid artery had thirty-two percent stenosis. Dr. Halloran never provided direct treatment to McGrew.

On July 29, 2016, the McGrews filed a petition against Dr. Otoadese, alleging medical malpractice.[3] The McGrews claimed Dr. Otoadese recommended and performed an unnecessary medical procedure, which placed McGrew at risk for having a stroke. They claimed Dr. Otoadese did not properly interpret the CT angiogram.

The McGrews' designation of experts, filed on February 6, 2018, included Dr. Bekavac and Dr. Halloran. The designation stated both doctors would be testifying on the applicable standard of care. Dr. Otoadese filed a motion in limine, seeking to exclude the expert opinion testimony of Dr. Bekavac and Dr. Halloran. The district court ruled Dr. Bekavac could testify only about matters relating to his treatment of McGrew. Dr. Bekavac could not give his opinion as to whether the first or second surgery was supported by McGrew's medical condition. The court ruled Dr. Halloran, who had not directly treated McGrew, could not testify.

Dr. Otoadese also sought to exclude evidence relating to other problems he had during his medical career, such as losing privileges at a hospital. The district court ruled this evidence would be precluded as it was irrelevant and unduly prejudicial.

During the trial, the plaintiffs made offers of proof of the testimony of Dr. Bekavac and Dr. Halloran. The jury returned a verdict for the defendants. The McGrews filed a motion for a new trial, claiming the district court abused its discretion by precluding Dr. Bekavac and Dr. Halloran from providing opinion evidence concerning the standard of care. They also claimed the court improperly

[3] The petition also named Dr. Cammoun as a defendant. There was a settlement with Dr. Cammoun, and he is no longer a party in the case.

prevented cross-examination of Dr. Otoadese's background and work history. The court denied the motion for a new trial. The McGrews now appeal.

II. Expert Witnesses

The McGrews claim the district court abused its discretion by limiting the testimony of Dr. Bekavac and prohibiting Dr. Halloran from testifying. They assert the court misinterpreted the law concerning the admissibility of expert testimony and they were prejudiced by the court's ruling.

We review the district court's evidentiary rulings for an abuse of discretion. *Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 664, 684 (Iowa 2020). There is an abuse of discretion when the court's ruling is based on grounds that are unreasonable or untenable. *Anderson v. Khanna*, 913 N.W.2d 526, 536 (Iowa 2018). "A ground is unreasonable or untenable when it is 'based on an erroneous application of the law.'" *Id.* (citation omitted).

The district court relied on *Hansen v. Central Iowa Hospital Corp*., 686 N.W.2d 476, 485 (Iowa 2004). In *Hansen*, a plaintiff failed to designate her treating physician as an expert witness in accordance with Iowa Code section 668.11 (2001). 686 N.W.2d at 480. The supreme court noted that a treating physician "ordinarily is not required to formulate [an opinion on causation] in order to treat the patient." *Id.* at 482. Under the facts in *Hansen*, the physician "formed his causation opinions as a *treater*." *Id.* The court determined the physician could give his opinion testimony on causation arising from treating the plaintiff, as the opinion was not "formulated as a retained expert for purposes of issues in pending or anticipated litigation." *Id.*

The opinions of Dr. Bekavac and Dr. Halloran concerning whether Dr. Otoadese should have performed the right carotid endarterectomy to remove plaque did not arise from treating McGrew. At the time Dr. Bekavac and Dr. Halloran arrived at their opinions, the surgery had already been performed. Their opinions as to whether the degree of stenosis of the right internal carotid artery warranted surgery did not affect the treatment of McGrew. Unlike the factual situation in *Hansen*, the physicians did not arrive at their opinions as a necessary part of the treatment of McGrew, and we conclude they were not treating physicians. *See* 686 N.W.2d at 482; *Sherrick v. Obstetrics & Gynecology Specialists, P.C.*, No. 17-0939, 2018 WL 5846055, at *4 (Iowa Ct. App. Nov. 7, 2018) (finding a physician's opinion was inadmissible because it did not relate to the care provided to the plaintiff). We conclude the district court properly determined Dr. Bekavac and Dr. Halloran could not testify as treating physicians.

Under Iowa Rule of Civil Procedure 1.500(2)(a), a party must disclose the identity of expert witnesses. *McConkey on behalf of B.M. v. Huisman*, No. 18-1399, 2019 WL 3317373, at *3 (Iowa Ct. App. July 24, 2019). Concerning Dr. Bekavac and Dr. Halloran, the McGrews assert the district court "erroneously focused on their status as treating care providers rather than the fact that they had been fully disclosed as expert witnesses." They state that rather than looking at whether Dr. Bekavac and Dr. Halloran were treating physicians, the court should have considered whether or not the doctors were properly disclosed as expert witnesses. The parties do not dispute that the McGrews advised Dr. Otoadese that they planned to call Dr. Bekavac and Dr. Halloran as witnesses.

In addition to the identity of an expert witness, a party must disclose the opinions held by an expert the party expects to call as a witness. Iowa R. Civ. P. 1.500(1). Dr. Otoadese sought to exclude the testimony of Dr. Bekavac and Dr. Halloran because they did not disclose the opinions they sought to introduce during the trial. The McGrews claim that in addition to properly disclosing that they intended to call Dr. Bekavac and Dr. Halloran as expert witnesses, they appropriately disclosed the proposed testimony of the doctors. If a physician assumes a role in litigation analogous to that of a retained expert, the rules pertaining to discovery of an expert's opinion apply. *Day by Ostby v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991).

"[T]he application of [rule 1.508, concerning discovery of an expert witness's opinions] does not necessarily depend on the label or role of the physician. Instead, it hinges on the reason and time frame in which the underlying facts and opinions were acquired by the physician." *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 612 (Iowa Ct. App. 1998). The Iowa Supreme Court has stated:

> The disclosure requirements of rule 1.508 are generally limited to physicians retained as experts for purposes of litigation or for trial. However, "even treating physicians may come within the parameters of rule [1.508] when they begin to assume a role in the litigation analogous to that of a retained expert." This will occur if the treating physician focuses more on the legal issues in pending litigation and less on the medical facts and opinions associated in treating a patient.

Eisenhauer ex rel. T.D. v. Henry Cty. Health Ctr., 935 N.W.2d 1, 22 (Iowa 2019) (citations omitted). Thus, under *Eisenhauer*, the question is not whether a witness has been retained as an expert, but rather whether the witness has "assume[d] a role in the litigation analogous to that of a retained expert." *Id.*

A doctor has taken a role analogous to that of a retained expert witness if the "physician focuses more on the legal issues in pending litigation and less on the medical facts and opinions associated in treating a patient." *Id.* Dr. Bekavac and Dr. Halloran were expected to testify concerning the degree of stenosis in McGrew's right carotid artery and whether Dr. Otoadese was negligent in recommending a right carotid endarterectomy. These opinions were relevant to pending litigation and not to the treatment of McGrew, as the opinions arose after the treatment had occurred.

We find Dr. Bekavac and Dr. Halloran had taken "a role in the litigation analogous to that of a retained expert." *See id*. For this reason, the rules pertaining to discovery of an expert's opinion applied to them. *See Day by Ostby*, 469 N.W.2d at 677.

Dr. Otoadese asserts the doctors did not submit medical reports under rule 1.500(2)(b). The district court found the doctors were not required to prepare a written report under Iowa Rule of Civil Procedure 1.500(2)(b).[4] Rule 1.500(2)(b) applies to witnesses who are retained or specially employed to provide expert testimony. *Stellmach v. State*, No. 15-2105, 2017 WL 1735618, at *9 (Iowa Ct. App. May 3, 2017).

Even if Dr. Bekavac and Dr. Halloran were not required to submit an expert report under rule 1.500(2)(b), we find they were subject to the requirements for the

[4] Rule 1.500(2)(b) provides:

> 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.

discovery of expert witness opinions under rule 1.500(2)(c). Rule 1.500(2)(c) applies to expert witnesses who are not required to provide a written report. The rule provides:

> 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.

Iowa R. Civ. P. 1.500(2)(c). A physician designated as an expert is expected to "disclose[ ] a summary of facts and opinions to which he was expected to testify." *See Eisenhauer*, 935 N.W.2d at 21 (citing Iowa R. Civ. P. 1.500(2)(c)(2)).

The exact nature of the doctors' opinions was unknown to the parties. Counsel for plaintiffs indicated he did not have access to the two doctors.[5] Defense counsel then stated, "Well, for heaven sakes, if he doesn't have access to them, I certainly don't." The purpose of the expert witness discovery rules is to "avoid[ ] surprise to the opposing party and to allow the parties to formulate their positions on as much evidence as is available."[6] *Faris v. City of Iowa Falls*, No. 12-0696, 2013 WL 988634, at *5 (Iowa Ct. App. Mar. 13, 2013).

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[5] The McGrews acknowledge Dr. Bekavac and Dr. Halloran were not retained experts, counsel stating:

> They were treating physicians. That's how we looked at them. And I certainly couldn't control them. If I wanted to retain them, I wouldn't have been able to retain them. They had chosen on their own that this is how they wanted to deal with it, and they weren't going to do anything other than that.

[6] The depositions of Dr. Bekavac and Dr. Halloran were scheduled but were later cancelled by the defense.

We conclude the district court did not abuse its discretion by ruling Dr. Bekavac could only testify concerning his treatment of McGrew, not to matters arising before he began treating him. Also, the court did not abuse its discretion by ruling Dr. Halloran could not testify in the case, as he did not provide any direct treatment to McGrew. The McGrews did not provide adequate disclosure of the nature of the doctors' opinions. We affirm the court's rulings on these issues.

III. Defendant's History

The McGrews assert the district court abused its discretion by limiting their ability to cross-examine Dr. Otoadese regarding his qualifications. They wanted to impugn Dr. Otoadese's credibility by presenting evidence to show he voluntarily surrendered his hospital privileges to perform open-heart surgery as part of a settlement with a local hospital and had not performed open-heart surgery since 2009. The McGrews state they were prejudiced because the jury was not provided a complete picture of Dr. Otoadese's work history.

During the trial, counsel for plaintiffs agreed that references to the litigation between Dr. Otoadese and a local hospital would not be discussed. On the issue of whether Dr. Otoadese could perform heart surgery at the hospital, the court stated:

> Well, and again, to the extent that I wasn't clear, I don't think that that's admissible either. Again, I think it can be explored that he used to do that; 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.

The McGrews also sought to present evidence to show Dr. Otoadese was terminated from a medical clinic and opened his own clinic in 2013. The district court ruled:

> 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 [the medical clinic], I think is inadmissible.

The McGrews claim the district court abused its discretion by ruling some parts of Dr. Otoadese's professional history were not admissible. They assert Dr. Otoadese was presented as an expert by the defense and "should have been subjected to the same scrutiny given to retained experts." Dr. Otoadese stated his termination from the medical clinic was related to a patient lawsuit, an out-of-court settlement, and a determination he was not insurable.

Evidence is admissible only if it is relevant; "[i]rrelevant evidence is not admissible." Iowa R. Evid. 5.402. "Evidence is relevant if it has a tendency to make a consequential fact more or less probable than it would be without the evidence." *State v. Thomas*, 766 N.W.2d 263, 270 (Iowa Ct. App. 2009) (citing Iowa R. Evid. 5.401). Even if evidence is relevant, it may still be excluded if the danger of undue prejudice substantially outweighs the probative value of the evidence. Iowa R. Evid. 5.403.

The district court's ruling denying the McGrews' motion for a new trial stated:

> The various evidence offered by the Plaintiffs concerning the ending of the relationship between Dr. Otoadese and [the medical clinic], 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 that evidence might provide.

We find the district court did not abuse its discretion in excluding this evidence.

Even when the evidence had a minimal probative value, it may also be excluded on the grounds that it is unduly prejudicial. *See* Iowa R. Evid. 5.403.

> We utilize a two-part test to decide whether evidence should be excluded under rule 5.403. "First, we consider the probative value of the evidence. Second, we balance the probative value against the danger of its prejudicial or wrongful effect upon the triers of fact." Probative value refers to "'the strength and force of the evidence to make a consequential fact more or less probable.'"

State v. Webster, 865 N.W.2d 223, 242 (Iowa 2015) (citations omitted). Evidence may be considered unfairly prejudicial if 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." *Id.* at 242–43.

In order to weigh the probative value of evidence against the danger of unfair prejudice, the court considers

> (1) the need for the proffered evidence "in view of the issues and other available evidence," (2) whether there is clear proof it occurred, (3) the "strength or weakness of the prior-acts evidence in supporting the issue sought to be prove[d]," and (4) the degree to which the evidence would improperly influence the jury.

Id. at 243 (citations omitted). "Weighing probative value against prejudicial effect 'is not an exact science,' so 'we give a great deal of leeway to the trial judge who must make this judgment call.'" *State v. Einfeldt*, 914 N.W.2d 773, 784 (Iowa 2018) (citation omitted).

There was no need for the evidence; there was no clear proof of exactly what occurred leading to the settlement agreements between Dr. Otoadese and the hospital and medical clinic. The evidence gave weak support to the proposition that Dr. Otoadese was negligent. *See Webster*, 865 N.W.2d at 243.

In addition, even if the evidence had some relevance, any probative value would be outweighed by the danger the evidence is unduly prejudicial. *See* Iowa R. Evid. 5.403. The evidence would improperly influence the jury to find Dr. Otoadese liable based on evidence involving different events. *See* Webster, 865 N.W.2d at 243. We conclude the district court did not abuse its discretion in finding the evidence was inadmissible.

The McGrews claim their due process rights were violated because they were unable to present the evidence of Dr. Otoadese's prior work history. This issue was first raised in the McGrews' motion for a new trial. In Dr. Otoadese's response to the motion, he noted the issue may not have been preserved. The district court did not rule on this constitutional issue. We conclude this issue has not been preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Finally, the McGrews' briefing refers to a matter involving a post-trial Board of Medicine settlement with Dr. Otoadese and the failure of Dr. Otoadese to

disclose this on-going investigation during discovery. We find such issue is not relevant to this appeal.[7]

We affirm the decision of the district court.

AFFIRMED.

[7] A motion to vacate judgment pursuant to Iowa Rules of Civil Procedure 1.1012 and 1.1013 was filed by the McGrews on January 21, 2020, and was pending at the time of the instant appeal.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
19-2137	McGrew v. Otoadese

Electronically signed on 2021-03-03 08:31:36

E-FILED 2018 FEB 06 6:18 AM BLACKHAWK - CLERK OF DISTRICT COURT

IN THE DISTRICT COURT OF IOWA IN AND FOR BLACK HAWK COUNTY

WILLIAM MCGREW and ELAINE MCGREW Plaintiffs, v. EROMOSELE OTOADESE, M.D.; NORTHERN IOWA CARDIOVASCULAR AND THORACIC SURGERY CLINIC, P.C.; and DRISS CAMMOUN, M.D. Defendant.	)	Case No. LACV130355 **PLAINTIFFS' DESIGNATION OF EXPERTS**

COME NOW the Plaintiffs and hereby designate the following persons who may be called as expert witnesses at the time of trial in the above referenced matter:

1. Dr. Carl Warren Adams
   101 Becket Lake Dr. @ Celadon
   Durango, CO 81301-8853

Dr. Adams is a Board Certified Cardiovascular and Thoracic Surgeon including Trauma and Surgical Critical Care. Dr. Adams will be asked to comment on the standard of care in the evaluation (imaging and surgery), care and treatment of an individual like Bill McGrew; the breach of that standard of care; and the cause-and-effect relationship between the breach of the standard of care and any damages and injuries sustained by Bill McGrew and his spouse.

Dr. Adams' education, training, experience, and qualifications to testify as an expert witness are set forth in his curriculum vitae which is being provided to counsel.

2. Dr. Ivo Bekavac
1735 W. Ridgeway Ave., Suite 112
Waterloo, Iowa 50701

Dr. Bekavac is a Board Certified Neurologist, with Subspecialty Board Certification in Vascular Neurology and Neuroimaging (among others) who, as a treating physician, will be asked to comment on the standard of care in the evaluation (imaging and surgery), care and treatment of an individual like Bill McGrew; the breach of that standard of care; the harm sustained by Bill McGrew; and the cause-and-effect relationship between the breach of the standard of care and any damages and injuries sustained by Bill McGrew and his spouse. He will also be asked to comment on the evaluation, care and treatment he has provided to Bill McGrew since he sustained the stroke on September 2-3, 2014.

Dr. Bekavac's education, training, experience, and qualifications to testify as an expert witness are set forth in his curriculum vitae which has been provided to counsel.

3. Dr. John Halloran
1825 Logan Ave.
Waterloo, Iowa 50701

Dr. Halloran is a Board-Certified Neuroradiologist who will be asked to comment on the evaluation of imaging studies on Bill McGrew that he reviewed at the request of Dr. Bekavac. He will also be asked to comment on the standard of care in the imaging evaluation of an individual like Bill McGrew, any breach of that standard of care, and the cause-and-effect relationship between the breach of the standard of care and any damages and injuries sustained by Bill McGrew and his spouse.

A professional summary of Dr. Halloran's education, training, experience, and qualifications to testify as an expert witness can be found at the website for UnityPoint Health: www.unitypoint.org/waterloo. A CV may be provided later.

4. Kent Jayne
502 Augusta Circle
North Liberty, Iowa 52317

Mr. Jayne is a Certified Life Care Planner, vocational rehabilitation specialist and an economist who has been asked to develop a life care plan for Bill McGrew and can then testify to the amount of money needed to fund that life care plan. Depending on how the court rules on the issue of a lien for medical expenses, he may be asked to determine what medical bills are related to the injuries and damages sustained by Bill McGrew due to the negligence of the defendants.

Mr. Jayne's education, training, experience, and qualifications are as set forth in his curriculum vitae, which is being provided to counsel.

The following witnesses are "experts" in that they have scientific, technical or other specialized knowledge. However, these individuals (like Dr. Bekavac and Dr. Halloran) have not been retained in anticipation of litigation, and their expert opinions, if any, have not been developed in anticipation of litigation, but rather arise from the fact that these individuals may be treating physicians to the Plaintiff or have such other connection to this litigation that they are fact witnesses with specialized expertise.

5. All of Bill McGrew's treating health care providers as disclosed in the

IN THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

WILLIAM MCGREW and ELAINE MCGREW, **Plaintiffs,** **vs.** **EROMOSELE OTOADESE, M.D.; NORTHERN IOWA CARDIOVASCULAR AND THORACIC SURGERY CLINIC, P.C.; and DRISS CAMMOUN, M.D.,** **Defendants**	)	**NO. LACV130355** **PLAINTIFF WILLIAM MCGREW'S SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 16 PROPOUNDED BY DEFENDANT OTOADESE (Treating Physicians)**

COMES NOW Plaintiff William McGrew and hereby submits his Supplemental Answer to Interrogatory No. 9 propounded by Defendant Otoadese in the above case.

/s/ Martin A. Diaz
Martin A. Diaz 000009676
ICIS AT0002000
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Swisher, IA 52338
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marty@martindiazlawfirm.com
Attorney for Plaintiffs

Copy: Counsel of Record on March 7, 2018

16. List the name, address, telephone number, and employer's name, address and telephone number of each person you expect to call as an expert witness (including, but not limited to, practitioners of the healing art) at trial, and with respect to each such individual, state:

(a) The educational and occupational background of the expert;

(b) All litigation in which each expert has been consulted or has given a deposition or has testified in trial, including the name and address of the court in which each case was pending, the names of the plaintiffs and defendants in each case, the name and address of the person engaging the services of such expert, the name of the person on whose behalf the expert testified, and whether such person was a plaintiff or defendant in the case;

(c) The subject matter or area on which each expert will testify;

(d) The substance of the facts and opinions, and a summary of the grounds for each opinion of each expert named by you in answer to this interrogatory;

(e) Whether each identified expert has completed preparation for testifying and is ready to express final opinions in this case, or, if the answer is to the contrary, when each expert will have completed preparation and will be ready to express final opinions in this case; and

NOTE: Rule of Civil Procedure 1.508(1)(a) also requires that for an expert retained in anticipation of litigation or for trial the expert shall SIGN the answer. Please comply with this rule.

ANSWER:

Plaintiffs will disclose the names of any retained expert witnesses as part of their designation to the court consistent with the deadline established.

Otherwise, Plaintiff intends to call the following people who were not retained for purposes of this case:

1. One or more members of the staff at New Aldaya Lifescapes Nursing Home, 7511 University Avenue, Cedar Falls, Iowa 50613

2. Dr. John Musgrave, 212 West Dale Street, Waterloo, Iowa 50703

3. Dr. Richard Mauer, Mauer Eye Center, 2515 Cyclone Drive, Waterloo, Iowa 50701

4. Dr. Ivo Bekavac, 1735 W. Ridgeway Ave., Suite 112, Waterloo, Iowa 50701

6. Dr. John Halloran, P O Box 2758, Waterloo, Iowa 50704

7. To the extent needed, any other healthcare provider to discuss evaluation, care and treatment in the past and future for Bill McGrew.

The above individuals can testify to the evaluation, care and treatment of Bill McGrew and can testify to those facts known, mental impressions formed and opinions held as a result of their contact with him. This may include standard of care opinions (as to Dr. Bekavac and Dr. Halloran), causation opinions (Dr. Bekavac), permanency (Dr. Bekavac) and future care and treatment (Dr. Bekavac, New Aldaya, and Dr. Musgrave).

SUPPLEMENT TO INTERROGATORY 16 PURSUANT TO IRCP 1.500(2)(c)

Dr. John Musgrave, Dr. Matthew Smith, Dr. Richard Mauer, Dr. Ivo Bekavac, and Dr. John Halloran may testify pursuant to previously produced medical records and Plaintiff's Designation of Experts, filed February 6, 2018.

Dr. Bekavac will testify as to the standard of care, causation, and permanency. In his medical record dated September 26, 2014, Dr. Bekavac reviewed the CTA and determined a stenosis of the right ICA of approximately 40%. 40% stenosis is not sufficient to justify endarterectomy. The first and therefore the second endarterectomy were unnecessary and violated the standard of care. Dr. Bekavac is a Board Certified Neurologist, with Subspecialty Board Certification in Vascular Neurology and Neuroimaging (among others) who, as a treating physician, will be asked to comment on the standard of care in the evaluation (imaging and surgery), care and treatment of an individual like Bill McGrew; the breach of that standard of care; the harm sustained by Bill McGrew; and the cause-and-effect relationship between the breach of the standard of care and any damages and injuries sustained by Bill McGrew and his spouse. He will also be asked to comment on the evaluation, care and treatment he has provided to Bill McGrew since he sustained the stroke on September 2-3, 2014.

Dr. Halloran, in his medical record dated October 9, 2014, reviewed the CTA and assessed a stenosis of 32%. Dr. Cammoun and Dr. Otoadese misread the CTA and

violated the applicable standard of care. Dr. Halloran is a Board-Certified Neuroradiologist who will be asked to comment on the evaluation of imaging studies on Bill McGrew that he reviewed at the request of Dr. Bekavac. He will also be asked to comment on the standard of care in the imaging evaluation of an individual like Bill McGrew, any breach of that standard of care, and the cause-and-effect relationship between the breach of the standard of care and any damages and injuries sustained by Bill McGrew and his spouse.

Dr. Musgrave may be asked to testify about Bill McGrew's medical history before and after his stroke and his care and treatment of Bill McGrew.

Dr. Maurer may be asked to testify about his care and treatment of Bill McGrew.

Dr. Smith has provided handwritten responses to questions propounded by Kent Jayne and those responses are part of the report prepared by Mr. Jayne. In addition, Dr. Smith may be asked to testify to his care and treatment of Bill McGrew.

September 26, 2014

RE: William McGrew
DOB: [redacted]

Mr. William McGrew comes in self-referral as well as his family for second opinion about stroke.

Bekavac, MD, PhD
Dept. of Neurology
17 W. Ridgeway Avenue
Suite 112
Waterloo, IA 50701
319.833.5954
FAX 319.833.5955

HISTORY OF PRESENT ILLNESS: According to the patient and his family on August 5, 2014 he had episode of visual problem, describes everything was greying on his eye lasting between one to two minutes. No associated weakness involving any part of his body. He was otherwise healthy except hypertension. He went to see Dr. Mauer, who send him to see Dr. Otoadese and CTA was done of the extracranial circulation on August 18, 2014. It 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%. Subsequently Dr. Otoadese performed right carotid artery endarterectomy on September 2, 2014. Prior to the surgery patient was asymptomatic. He was not taking aspirin when this event occurred and was just started a week or so before the surgery. Extensive records reviewed around 60 pages. After surgery he was doing great and then very next morning around 7:10 it was noticed by nurse as well as his daughter the patient was confused and had left facial droop. Dr. Almullahassani, a neurologist was called who ordered CTA which apparently showed right ICA occlusion. CTA was done at 11:05 and symptoms started around 7:10 a.m. MRI of the brain showed acute right M2 territory ischemic infarct and some changes involving basal ganglia involving territory of the lenticulostriate arteries. Dr. Almullahassani requested second endarterectomy and clot removal. Apparently Dr. Otoadese was not willing to do so, but then Dr. Almullahassani according to the patient's daughter asked for opinion by Dr. Karimi, a vascular surgeon at Covenant Medical Center was about to transfer the patient, then finally Dr. Otoadese came back and performed right endarterectomy between 3:00 to 3:30 p.m. After the surgery the patient had complete weakness on the left side. Prior to that family is not sure whether he had any weakness involving his left hand at all. Also became confused and eyes were looking to the right side. He has been essentially the same since the second surgery. Repeat MRI done following day did reveal very similar area of infarction according to my review essentially unchanged from previous one done day before. The patient has been on aspirin for stroke prophylaxis 325 mg a day. Since the surgery he has been also complaining of lower back pain on the left side without shooting distally. No imaging of the lumbosacral spine. He has been doing stroke rehabilitation. The patient wants to know exactly the reasoning behind surgery whether first surgery and second surgery was indicated.

REVIEW OF SYMPTOMS: Complete review of (14) systems and complete past medical and social history was performed using the Medical Questionnaire dated and signed September 26, 2014. In addition to the above, no additional complaints.

PLAINTIFFS' EXHIBIT 11

PAST MEDICAL HISTORY: Hypertension.
SOCIAL HISTORY: He used to smoke one pack a day for 40 years, quit smoking 10 years ago. No alcohol.
FAMILY HISTORY: Father died at the age of 81 with myocardial infarction. Mother died at the age of 63, ALS.
ALLERGIES: None.
PRESENT MEDICATIONS: Medications were reviewed and can be found on the patient information sheet located in the chart.

PHYSICAL EXAMINATION: He is well developed and in no apparent distress.
Vitals: Blood pressure 120/84 with a heart rate of 78 and respiratory rate of 16.
HEENT: Head is atraumatic and normocephalic. Funduscopic examination not performed because of miosis. The rest of the ENT exam is normal.
Neck: Supple. No JVD and no carotid bruits. No lymphadenopathy.
Heart: Regular rhythm and rate. No murmur.
Lungs: Clear to auscultation and percussion.
Abdomen: Not examined.
Extremities: No clubbing, cyanosis or edema.
NEUROLOGICAL EXAMINATION:
Orientation: He was found to be awake, alert, and oriented X3.
Recent and Remote Memory: Normal.
Attention Span and Concentration: Normal.
Cranial Nerve exam: There is conjugate gaze preference to the right side, but he can pass midline all the way to the opposite side. No nystagmus. Rest of cranial remarkable for left facial weakness, central type except visual field not tested.
Motor Exam: Motor strength in left upper and lower extremities is 0/5, right side 5/5.
Sensory Exam: Intact to all modalities.
Reflexes: Brisk on the right side 3/4, left 3+/4. Plantar response in the left side is extensor, right is flexor.
Gait: He is in a wheelchair, unable to walk
Language: Intact.
Fund of Knowledge: Normal.
Speech: Normal.
Test of Coordination: Finger-to-nose and heel-to-shin normal.

IMPRESSION:
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.
3. Right M2 territory embolic, artery-to-artery infarction. Not so much change in comparison to previous MRI of the brain.
4. Lower back pain might be discogenic versus musculoskeletal in etiology.

PLAN:
1. Continue aspirin 325 mg a day for secondary stroke prophylaxis.
2. Obtain an MRI of the lumbosacral spine.

PLAINTIFFS' EXHIBIT 11

3. I will ask Dr. Halloran, neuroradiologist to review CTA because of discropancy between my review and Dr. Cammoun review. Also we will ask him to review MRI done on September 3, 2014 and September 4, 2014. I encouraged the patient and his family to be very engaged in stroke rehabilitation.
4. Reevaluate the patient in one month or earlier as needed.
5. The patient will be notified as well as his family regarding MRI findings.

6. Spent one hour with the patient and his family as well as reviewing records

Ivo Bekavac, M.D., Ph.D.

IB/ts/wkm

PLAINTIFFS' EXHIBIT 11