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' Resistance to Application for Further Review Of Court of Appeals March 3, 2021 Decision

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Resistance to Application for Further Review

Defendant-Appellee Dr. Eromosele Otoadese[1] resists Plaintiffs' Application for Further Review of the Court of Appeals' March 3, 2021 Decision ("Decision") and states:

1. Plaintiffs are simply seeking another appellate review of the admissibility of testimony from two physicians. The Court of Appeals applied Iowa case law in the context of expert disclosure rules to hold that, under the disclosures in this case, the district court did not abuse its discretion in limiting testimony to opinions developed during care and treatment. Decision at 10. Plaintiffs do not argue that the case law relied upon does not apply or should be overturned.

2. "Further review by the supreme court is not a matter of right, but of judicial discretion. An application . . . will not be granted in normal circumstances." Iowa R. App. Proc. 6.1103(1)(b).

3. In their initial briefing, Plaintiffs stated "[t]his case should be transferred to the Iowa Court of Appeals for decision because it presents the application of existing legal principles." Plaintiffs' Brief at 10, 6-17-2020. This

[1] Defendants-Appellees are referred to collectively as "Dr. Otoadese." References to Plaintiff singularly are to Plaintiff William McGrew.

case *still* presents the application of existing legal principles. Further review is not needed.

4. While Plaintiffs reference new rules of civil procedure, their Question for Review reflects a very case-specific factual issue to which the Court of Appeals applied existing legal principles—did Plaintiffs "'provide adequate disclosure of the nature of the doctors' expert opinions'?" Application at 2. The Court of Appeals reviewed a rather complex record to affirm the district court's holding that the physicians should be limited to opinions developed during treatment. The unusual circumstances of this case render it poorly-suited for Plaintiffs' suggestion that upon further review the Court could provide guidance on expert disclosure rules.[2]

5. As explained below, there is actually no dispute to review as to the new rules for expert disclosures. Plaintiffs have always argued that they were not required to provide signed expert reports for the physicians under Iowa Rule of Civil Procedure ("Rule") 1.500(2)(b). The Court of Appeals essentially

[2] The district court noted the unusual nature of the treating physician issue. *See* Day 1, 32:2-14 (describing "unusual" circumstances); Day 5, 154:2-24 ("this is a bit of an unusual situation"). Indeed, Plaintiffs sought to introduce standard of care and breach opinions from treating physicians without signed expert reports. This Court has observed that treating physicians are not ordinarily required to formulate standard of care opinions in the course of treatment and "an opposing party should . . . be able to expect that a treating physician's testimony will not include opinions on reasonable standards of care." *Hansen v. Central Iowa Hospital Corp*, 686 N.W.2d 476, 482 (Iowa 2004).

assumed Plaintiffs were correct but still held Plaintiffs' disclosure was insufficient. Decision at 8-10 (applying Rule 1.500(2)(c)). Thus, this case is not about a dispute over the new rules. It is a case properly transferred to the Court of Appeals for application of existing legal principles.

6. Plaintiffs argue there is conflict between the district court and Court of Appeals. This is not grounds for further review. Moreover, to the extent there was some ambiguity as to the meaning of the district court's statements about disclosure, the Court of Appeals removed that ambiguity. The Court of Appeals' Decision was clear on the issue of disclosure—it was inadequate.

7. This case is also poorly suited for further review because of the lack of prejudice. While the Court of Appeals did not decide the issue of prejudice, Plaintiffs were able to introduce the most critical evidence from the two physicians notwithstanding the exclusion of standard of care and breach opinions.

WHEREFORE, for the reasons set forth above and below, Dr. Otoadese respectfully requests that Plaintiffs' Application be denied.

Argument

I. Review of the Court of Appeals' Decision is not warranted.

This case involves the admissibility of standard of care and breach opinions from two physicians (Dr. Ivo Bekavac and Dr. John Halloran) who

never provided signed expert reports. Plaintiffs have suggested that all they ever sought to introduce were opinions and statements set forth in medical records of the two physicians—so, of course, there was full disclosure. But this was *not* the issue for the district court. Plaintiffs expressly sought to introduce *much more* at trial—opinions from both physicians that were never disclosed. The Court of Appeals recognized this and correctly held that Plaintiffs "did not provide adequate disclosure of the nature of the doctors' opinions." Decision at 10.

Under well-settled Iowa law, when a physician ventures outside a treatment role and assumes a role analogous to a retained expert, his or her "expert" opinions may be excluded at trial if not properly disclosed. *See Hansen v. Central Iowa Hospital Corp*, 686 N.W.2d 476, 483 (Iowa 2004); *Hagenow v. Schmidt*, 842 N.W.2d 661, note 4 (Iowa 2014) (concluding causation opinion from treating physician 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); *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); [3] *see also 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).").

The district court found that standard of care and breach opinions by Dr. Bekavac and Dr. Halloran were developed in a role analogous to a retained expert and excluded the opinions. While the district court indicated there was disclosure, such references must be read in the context of the entire proceedings and the court's rulings. The Court of Appeals affirmed exclusion of the opinions, finding they did not arise out of treatment and Plaintiffs did *not* provide adequate disclosure. Decision at 6-10.

The Court of Appeals Decision flows from, and is consistent with, Iowa law on the required disclosure of expert opinions generally and under the circumstances arising in this case. The Court of Appeals first considered if the physicians' purported opinions as to standard of care and breach arose out of treatment and concluded they did not.

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[3]Prior to Rule 1.500(2)(b), 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).

> 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.

Decision at 6. Plaintiffs do not complain about the conclusion that the physicians had stepped outside their role as treating physicians.

Next, the Court of Appeals discussed the Rule requirements to disclose the "identity" of experts, noting this requirement was not in dispute. *Id.* However, in addition to disclosure of identity, the Rules require disclosure of opinions. *Id.* at 7.

After discussing relevant Iowa case law, the Court of Appeals found:

> A doctor has taken a role analogous to that of a retained expert 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." [quoting *Eisenhauer ex re. T.D. v. Henry Cty Health Ctr.*, 935 N.W.2d 1, 22 (Iowa 2019)]. Dr. Bekavac and Dr. Halloran were expected to testify . . . . 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.

Decision at 8. It follows that the rules pertaining to discovery of an expert's opinion applied. *Id.* (citing *Day v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991)).[4]

[4] Plaintiffs have never disputed that Iowa law requires disclosure of a treating physician's standard of care opinions. They argue that "even treating care physicians can testify to the standard of care *so long as* they have been

Next, the Court of Appeals directly dealt with the issue about which Plaintiffs complain—application of Rules 1.500(2)(b) and (c). Importantly, the Court of Appeals held that *even if* Drs. Bekavac and Halloran were not required to provide a signed report as retained or specially employed experts under Rule 1.500(2)(b), the physicians "were subject to the requirements" of Rule 1.500(2)(c) that requires disclosure of a "summary of facts and opinions." Decision at 8-9.[5] The Court of Appeals found this required disclosure had not occurred:

> The exact nature of the doctor's opinions was unknown to the parties. Counsel for plaintiffs indicated he did not have access to the two doctors. . . .
>
> . . . The McGrews did not provide adequate disclosure of the nature of the doctor's opinions. We affirm the court's rulings on these issues.

Decision at 9-10 (footnotes omitted).

Thus, Plaintiffs' complaint with the Court of Appeals' Decision is a disagreement with the Court's view of the specific procedural facts—*not* the application of new Rules. The Court of Appeals held that even under Plaintiffs'

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appropriately designated as experts and *their expected opinions had been disclosed to the defense*. That is the holding of *Hansen*." Application at 14 (emphasis added). This case is about the adequacy of disclosure under existing legal principles, not a dispute about the law.

[5]At trial, Plaintiffs argued signed expert reports were not required and Rule 1.500(2)(c) applied. App. 111 (Plaintiffs' resistance to motion in limine).

view—that signed expert opinions were not required—it was not an abuse of discretion to exclude the physicians' testimony.[6]

Contrary to Plaintiffs' suggestion, the Decision does not contradict the purpose of Rule 1.500(2)—which Plaintiffs identify as to "avoid surprise." Application at 5. While Plaintiffs' disclosures indicated they intended to elicit full blown expert opinions from the treating physicians on the applicable standard of care that was breached by Dr. Otoadese, the physicians' actual opinions on those subjects are—to this day—unknown. *See* below.

Plaintiffs' argument that the inability of the Civil Justice Task Force to come to an agreement on certain expert rules means this Court should review this case to provide guidance is not persuasive. First, Plaintiffs did not even cite to the Task Force Report until their reply brief in this appeal. If the lack of clarity was so great as to warrant this Court's review, it should have been cited in Plaintiffs' initial brief. Second, the specific issues which the Task Force could not resolve as quoted by Plaintiffs are not involved in this case. *See* Application at 7 (quoting report that identified no consensus reached on "'[l]imitation of the

[6] 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).

number of experts, restriction of experts' testimony to the contents of their reports,[7] and acceleration of disclosure requirements'").

The Decision is consistent with Iowa case law and Rule 1.500(2). The Court of Appeals applied existing legal principles to the circumstances of this case. There is no reason for further review.

II. The Court of Appeals' Decision is correct—there was no abuse of discretion by the district court.

A more detailed review of the merits demonstrates the Decision is correct.

A. Summary of select evidence and closing argument.

A carotid endarterectomy surgery was performed by Dr. Otoadese on Plaintiff on September 2, 2014. Plaintiff suffered a stroke—a known complication of the surgery.[8] Plaintiffs alleged the surgery was unnecessary and that Dr. Otoadese was negligent in recommending it. The jury disagreed, finding in favor of Dr. Otoadese. App. 205-08 (Order).

Critical evidence at trial on whether surgery was necessary concerned the degree of stenosis (or narrowing) of the carotid artery. Plaintiff underwent an angiogram to determine the extent of the stenosis. It was interpreted by

[7] This case is not about restricting testimony to expert reports—Plaintiffs produced no expert reports for the two physicians at issue.

[8] *See* Day 4, 131:8-133:11. 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).

radiologist Dr. Cammoun as showing 65% stenosis. Day 5, 37:14-25, 40:24-42:2. Dr. Otoadese estimated the stenosis as 70% and recommended surgery. *See* App. 249 (Trial Exh. A at 6). Dr. Otoadese's experts agreed that surgery was appropriate. Day 4, 124:2-24, 127:8-10; Day 5, 120:23-121:14. Plaintiffs' surgical expert, Dr. Adams, disagreed, testifying that the stenosis was 35-45%. Day 4, 19:3-23.

Plaintiffs were also allowed to introduce evidence that neurologist Dr. Bekavac assessed the stenosis as approximately 40% and that he viewed this as significantly different from 65%. Day 2, 147:9-148:11 (Bekavac before jury). Dr. Bekavac was also allowed to testify that he asked board certified neuroradiologist Dr. Halloran to interpret the angiogram 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 testimony from Dr. Otoadese that Plaintiff would not have been a surgical candidate if Drs. Bekavac and Halloran were correct in their 32-40% determinations. Day 4, 89:7-19.

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. . . . It is Dr. Bekavac that drives

> this case because without Dr. Bekavac's willingness to say that, there's no case here. . . .
> . . .
> . . . 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, 32:19-23.

B. Summary of relevant proceedings.

In addition to Dr. Adams, Plaintiffs designated Dr. Bekavac and Dr. Halloran. *See* App. 11-13. *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 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).[9]

Plaintiffs disclosed what they intended to elicit from the two physicians in an interrogatory answer (which was not signed by the physicians). App. 97-100 ("Interrogatory Answer"). 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 39, 6-17-2020 (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 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). Nor did Plaintiffs ever produce signed expert reports for either physician.

Citing *Hansen*, Dr. Otoadese moved in limine on any "testimony or other evidence from treating health care providers that exceeds the proper scope of

[9] 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).

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

In an 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. 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. In his offer of proof, Dr. Halloran confirmed that his report was actually *not* generated for treatment as "the treatment had already occurred." Day 3, 14:10-15:10.

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 allowed Dr. Bekavac to testify about his determination of the 40% percent stenosis. Day 2, 4:23-6:1, 7:1-4. The court ultimately 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." Day 2, 127:7-22, 129:7-15; *see also* Day 3, 4:4-5:9, 20:6-17 (ruling as to Dr. Halloran).

On appeal, Plaintiffs did not argue the district court abused its discretion in finding that Drs. Bekavac and Halloran were, in part, acting outside a treatment role. Nor did Plaintiffs argue *Hansen* does not apply. Instead, Plaintiffs argued 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 read too much into the court's discussion of disclosure. Further, to the extent the district court's discussion of disclosure created an ambiguity, the Court of Appeals resolved it by clearly and concisely stating Plaintiffs failed to adequately disclose the physicians' opinions. Decision at 2, 10.

C. The Court of Appeals correctly found that Plaintiffs did not adequately disclose.

As the Court of Appeals found, under either Rule 1.500(2)(b) or (c), a party is required to disclose opinions of an expert—in a signed written expert report under (b)[10] or in a summary of the actual opinions under (c).

[10]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'"). Plaintiffs suggest that defense counsel stated in oral argument that the defense withdrew the request to depose Drs. Bekavac and Halloran in order to support an argument that their opinions were not disclosed. Defense counsel does not share this recollection. Nor did the Court of Appeals mention or rely upon such an argument.

1. The medical reports do not disclose the opinions Plaintiffs sought to introduce.

Plaintiffs rely upon the physicians' medical reports to satisfy their disclosure obligation. But those medical reports (Court Exhibits 1-2) do not contain opinions which Plaintiffs argue they should have been allowed to elicit from both physicians—the applicable standard of care that was breached by Dr. Otoadese. Plaintiffs repeatedly stated their clear intent to introduce *more* than what is set forth in the medical reports.[11] In other words, Plaintiffs were not satisfied with the physicians' medical reports but sought to elicit testimony at trial that went well beyond them.

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 statement" of an opinion "and the basis and reasons" for it as required under Rule 1.500(2)(b).

Nor is it an actual standard of care or breach opinion—which Plaintiffs sought to introduce. *See* Rule 1.500(2)(b) and (c). As Dr. Bekavac testified in his offer of proof: "in medicine, as you know, we don't have to agree about

[11] See App. 97-100 ("Interrogatory Answer"); Plaintiffs' Brief at 39, 6-17-2020 (arguing Dr. Bekavac should have been allowed to testify "to his opinions formed at the time that he wrote [Court Exhibit 1]").

something." Day 2, 99:4-5. A medical disagreement is not the equivalent of an opinion that a physician breached the standard of care.

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 at trial 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.

2. The Interrogatory Answer does not disclose the opinions Plaintiffs sought to introduce.

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 subject matter of expected testimony. Rule 1.500(2)(c) requires a summary of opinions.

3. 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. 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. In fact, as explained below, Plaintiffs actually didn't know what the physicians would say on these subjects.

The record does not support Plaintiffs' suggestion that there were three occasions where the district court purportedly held the physicians fully disclosed.

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. The district court was most likely only addressing that Plaintiffs designated the physicians in their Iowa Code §668.11 designation. 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; 45:15-16. 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 for all purposes. In fact, 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. Moreover, while the district court was waiting to hear the physicians' opinions during the offers of proof, Plaintiffs never elicited them.[12]

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 the court's opinion that a written report

[12] While the Court of Appeals did not address error preservation, Dr. Otoadese argued that Plaintiffs did not preserve error as they failed to elicit testimony from Drs. Bekavac and Halloran in their offer of proofs as what opinions they actually held on the standard of care violated by Dr. Otoadese. *See* Day 2, 94:7-121:22, Bekavac; Day 3, 6:1-16:9, Halloran.

was not required. The court does not address Rule 1.500(2)(c) or state that Iowa case law (such as *Hansen*) does not require more or different disclosure.

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.[13] 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.

[13]*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").

The Court of Appeals' Decision that Plaintiffs "did not provide adequate disclosure of the nature of the doctors' opinions" was correct.

III. Plaintiffs cannot show prejudice.

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). 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).

While the Court of Appeals did not affirm on this grounds, it is another grounds to deny further review.

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).

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. There was no prejudice.

Conclusion

For the reasons set forth above, Dr. Otoadese respectfully requests that the Court deny Plaintiffs' Application.

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