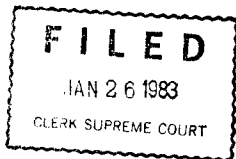


## IN THE COURT OF APPEALS OF IOWA



MARY KAY RIECK and  
RICHARD E. RIECK,

Plaintiffs-Appellants,

vs.

IVAN E. BROWN, M.D.; PAUL D. BOONE,  
M.D.; and THE HARTLEY MEDICAL  
CENTER, P.C.,

Defendants-Appellees.

Filed January 26, 1983

2-336  
2-67453

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Appeal from Clay District Court - Charles H. Barlow, Judge.

Plaintiffs appeal from the judgment upon a jury verdict for defendants claiming that the trial court erred in preventing plaintiffs' expert witness from expressing an opinion as to whether defendants had violated the standard of care the expert had just articulated. REVERSED AND REMANDED.

David R. Crary and Daryl L. Hecht of Crary, Huff, Yates & Clem, P.C.,  
Sioux City, for plaintiffs-appellants.

Maurice B. Nieland of Kindig, Beebe, Rawlings, Nieland & Killinger, Sioux  
City, for defendants-appellees.

Heard en banc.

**DONIELSON, J.**

Plaintiffs appeal from the judgment upon a jury verdict for defendants claiming that the trial court erred in preventing plaintiffs' expert witness from expressing an opinion as to whether defendants had violated the standard of care the expert had just articulated. On appeal plaintiffs assert that the court erred in ruling that there was no foundational showing that the expert witness, who was from Chicago, was familiar with the standards of care which were applicable in rural Iowa. We reverse and remand.

Our scope of review is on assigned errors. Iowa R. App. P. 4.

**I.**

Defendant doctors practice medicine at the Hartley Medical Clinic. The defendant doctors diagnosed a lump located in the breast of plaintiff Mary Rieck to be something other than cancer. She first noticed the lump in 1975. She was examined by Dr. Brown who noted in his medical records that plaintiff had a lump in the upper left quadrant of her breast, but did not advise her to schedule another appointment to monitor the problem. She attended the clinic again in 1976, where she was examined by Dr. Boone who identified the lump as a gland problem. The lump persisted and plaintiff sought additional medical attention from Dr. Brown in April, 1977. Dr. Brown defined the lump as "a hard mass yet it seems to be a separate gland and not a true lump . . . . Should be observed closely." He did not recommend any additional diagnostic examinations. Plaintiff saw Dr. Brown again in July, 1977 when he described the abnormality as a firmness along the entire left side of the breast, but identified it as being "not a true lump."

In February, 1978, plaintiff consulted a Dr. Helmers from Sibley, Iowa, who recommended further diagnostic examinations, including a mammogram and a biopsy. The lump was determined to be cancerous which required a radical mastectomy. During surgery, it was determined that the malignancy had spread

to the lymph nodes, six of which had to be removed. Plaintiff received radiation and chemotherapy at the Mayo Clinic in Rochester, Minnesota. There is, however, a high possibility of reoccurrence. Plaintiff and her husband then sued the defendants for medical malpractice alleging that the mistaken diagnosis and consequent delay in treatment had permitted the cancer to grow, thereby requiring more extensive treatment and increasing the chance of a recurrence.

One of the plaintiffs' witnesses at trial was Dr. Harvey Golomb, a professor of medicine from the University of Chicago, who specializes in the treatment of cancer. Dr. Golomb articulated a standard of care for the investigation and treatment of lumps in the breast. The plaintiffs' attorney then asked Dr. Golomb whether the conduct of the defendant doctors fell within that standard of care. Defendants made the following objection to this question:

That's objected to as incompetent, irrelevant and immaterial. There's no foundation in this record for this witness to testify as to the standard of care in these circumstances. It's without proper and sufficient foundation and it calls for an opinion and conclusion on behalf of this witness that he's not been qualified to give.

The court sustained the objection and, four days later, explained its ruling by stating there had been no foundational showing that Dr. Golomb was familiar with the standards of care which were applicable in rural Iowa. The plaintiffs' witness had departed, but they made an "offer of proof" consisting of a statement by counsel that Dr. Golomb would have testified the defendants' conduct did not meet the standard of care he had articulated.

The defendants later presented medical witnesses who testified that the initial diagnosis was a reasonable one and that many or most breast lumps are not cancerous. The jury returned a verdict for defendants. Plaintiffs then instituted this appeal from the resulting judgment.

- 3 -

## II.

The only issue with which we are presented is whether the trial court erred in excluding the opinion of plaintiffs' expert witness, Dr. Golomb, regarding the performance of defendant doctors. Initially, the defendants contend that the plaintiffs waived error on this issue, both because their "offer of proof" described above was inadequate and because the plaintiffs did not ask the trial court to state its reasons for sustaining the objection until four days after the ruling. We disagree.

Dr. Golomb testified on Friday, May 8th. The objection was made at that time. After plaintiffs completed their examination of Dr. Golomb, the trial was adjourned until 9:00 a.m. Tuesday, May 12th. On Tuesday morning, in chambers, the plaintiffs requested the court to state its reasons for the ruling. While this was accomplished four days after the objection was sustained, this time period included a weekend and a Monday upon which no trial was held. The record was made the very next day of the trial proceedings. We refuse to regard this sort of delay as a waiver of the right to object to the evidentiary ruling. We also find that defendants cannot object to the offer of proof as being inadequate. They made no objection to the form or substance of the offer when it was made out of the presence of the jury on Friday, May 8th, before court was adjourned. Moreover, they made no objection to the form or substance of the offer of proof on Tuesday morning when the plaintiffs requested the court to state its reason for the ruling. They object only to the timeliness of this latter request. We thus refuse to consider the defendants' challenge to the form and substance of plaintiffs' offer of proof. See Davidson v. Van Lengen, 266 N.W.2d 436, 439 (Iowa 1978). We thus proceed to the merits.

## III.

This court has noted that the trial court has considerable discretion in ruling

on the receipt of opinion testimony and its ruling will not be disturbed absent a manifest abuse of that discretion. Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 524 (Iowa Ct. App. 1977). However, the determination to exclude expert opinion testimony "must be a legal one based on sound judicial reasons." Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 901 (Iowa 1980) (quoting Dougherty v. Boyken, 261 Iowa 602, 605, 155 N.W.2d 488, 490 (1968)).

The trial court gave the following reason for excluding Dr. Golomb's opinion testimony:

I saw no similarity in the circumstances between the Dr. Golomb's practice and experience, as compared with the practice of the Defendants.

\* \* \*

And also, no showing by Dr. Golomb of familiarity with the standards that would be applicable to Doctors Brown and Boone.

The court's ruling was thus focused on the medical standards which would govern the diagnosis and treatment of breast cancer. In so ruling we believe the court erroneously applied the principles of the "locality rule." The "locality rule" placed a qualification upon the care and skill required of a treating physician based on both the circumstances and locality of the treatment. Speed v. State, 240 N.W.2d 902, 907 (Iowa 1976). The rule provided that, in medical malpractice cases, the legal standard of care was to be qualified by the "diligence and methods of diagnosis as are usually approved and practiced by physicians of ordinary skill and learning under like circumstances and in like localities." Id. (quoting Sinkey v. Surgical Associates, 186 N.W.2d 658, 660 (Iowa 1971) (emphasis added)). The court in Speed noted the vast number of cases in which the "locality rule" was rejected and indicated that "the locality question is merely one circumstance, not an absolute limit upon the skill required." Id. at 908 (quoting McGulpin v. Bessmer, 241 Iowa 1119, 1131, 43 N.W.2d 121, 128 (1950)). The record before us demonstrates

that plaintiffs' expert witness, Dr. Golomb, has an extensive expertise in and familiarity with the diagnosis and treatment of breast cancer. He articulated the national standard of care as follows:

Q. Doctor, are you familiar with the standard of care in the United States, the general standard of care, that pertains to the diagnosis and treatment of breast cancer? A. Yes, Sir.

Q. And what is that standard of care, Doctor? A. The standard of care is that when there is a breast mass that has recently been found, it should be aggressively evaluated and be biopsied within a month to six weeks, as I stated earlier, to determine whether it's cancer or not cancer.

Q. Doctor, did the care by Doctors Brown and Boone, as reflected from all of the medical records that you have in your file, fall within that standard of care you've just described?

In Hedges v. Conder, 166 N.W.2d 844, 856 (Iowa 1969), the court reviewed the definition of and the foundational qualifications for an expert witness' testimony:

In Dougherty v. Boyken, Iowa, 155 N.W.2d 488, 490, we defined an expert "as one who is qualified by study, training, or experience in a particular subject or field of endeavor which gives him special knowledge and permits him to form a definite opinion of his own on matters persons lacking such knowledge or training cannot correctly decide. 31 Am.Jur.2d, Expert and Opinion Evidence, section 26, page 523; 32 C.J.S. Evidence, § 457, page 98....

Expert testimony is not admissible unless the witness is shown to be qualified and the facts upon which he bases his opinion are sufficient to enable a witness so qualified to express an opinion which is more than a mere conjecture. Hardwick v. Bublitz, 254 Iowa 1253, 1259, 119 N.W.2d 886, 889.

In addition, the facts upon which the opinion is based must be disclosed to the trier of fact. Speed, 240 N.W.2d at 910. We believe that, on the record before us, these foundational elements were satisfied. Dr. Golomb testified that he had examined the medical records of the case, copies of which were introduced into

evidence for the jury's consideration. It should be noted that, in expressing his opinion, an expert should recite the facts upon which his opinion is based. Hedges, 166 N.W.2d at 857. We believe Dr. Golomb should have been allowed to give his opinion as to whether defendants met the standard of care he articulated. The court's ruling was an abuse of discretion which prejudiced plaintiffs' case. Since we hold the trial court's ruling to be prejudicial error, we reverse and remand for new trial.

REVERSED AND REMANDED.