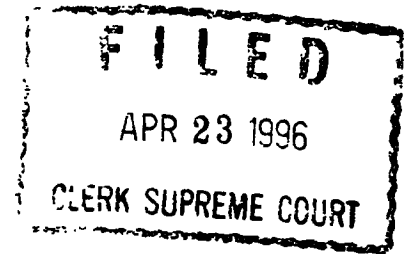


IN THE COURT OF APPEALS OF IOWA

No. 5-559 / 94-1674



TYLER D. GREENE, by his Parents and Next Friends, **Paul D. Greene** and ,
Gina S. Greene, and **PAUL D. GREENE** and **GINA S. GREENE**, Individually,

Appellants,

vs.

COVENANT MEDICAL CENTER,

Appellee.

Appeal from the Iowa District Court for Black Hawk County, K. D. Briner,
Judge.

The Greenes appeal an adverse judgment in their medical malpractice case
against Covenant Medical Center. **AFFIRMED.**

Stephen J. Powell and Mark F. Conway of Swisher & Cohrt, Waterloo, for
appellants.

Edward J. Gallagher, Jr. and George L. Weilein of Gallagher, Langlas &
Gallagher, P.C., Waterloo, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

PER CURIAM

This is an appeal by plaintiffs claiming the district court abused its discretion in restricting their ability to present rebuttal testimony in this medical malpractice case. The district court denied their request for a new trial. We affirm on appeal.

Paul and Gina Greene are the parents of Tyler Greene, who was born on February 7, 1990. When delivery started, Paul called for an ambulance from Covenant Medical Center. The ambulance got lost. While the Greenes were waiting for the ambulance, Tyler started coming out of the birth canal in a breech position. It was about thirty minutes after Paul called that Gina arrived at the hospital, and received medical assistance. Tyler was born with neurological damage.

The Greenes filed this suit, claiming Covenant was negligent in not responding immediately to their call and that this delay caused brain damage.

During the trial, plaintiffs presented expert testimony to support their position. After plaintiffs' causation experts had testified, but before plaintiffs rested, plaintiffs became aware of an article (Lewis Rosenbloom, *Dyskinetic Cerebral Palsy and Birth Asphyxia*, *Developmental Medicine and Child Neurology* (April 1994)), which they believed **had** relevance to this case. Plaintiffs did not present this article during their case in chief. They did question defense experts about whether the factors in the Technical Bulletin should be applied to children with Tyler's problems, but did not specifically mention the article.

Plaintiffs sought to present the Rosenbloom article on rebuttal through the testimony of Dr. Alfred Healy, a professor of pediatrics at the University of Iowa Hospital School. Dr. Healy is the chairperson of the publications committee of the American Academy for Cerebral Palsy in Developmental Medicine, which published the article. Defendant objected to the proposed rebuttal testimony.

Dr. Healy had previously testified in the trial that he had examined Tyler and had diagnosed him as having dyskinetic cerebral palsy. Because Dr. Healy had not been timely designated as an expert, in a pre-trial ruling the court had determined he could not testify to the cause of the cerebral palsy. The district court ruled that on rebuttal Dr. Healy could testify to the different forms of cerebral palsy and their clinical signs. Dr. Healy was not permitted to testify to the issue of cause or the criteria in the Technical Bulletin. The court also ruled plaintiffs would not be permitted to present the conclusions of the article through a witness other than Dr. Healy. Plaintiffs made an offer of proof.

The jury found Covenant negligent. It concluded, however, this negligence was not the proximate cause of Tyler's injuries. The court denied plaintiffs' request for a new trial. Plaintiffs appealed.

I. Defendant claims plaintiffs failed to preserve error in this case because their offer of proof was not sufficiently detailed. The burden of making an offer of proof to preserve error is on the party that urges the evidence should have been admitted.

Strong v. Rothamel, 523 N.W.2d 597, 599 (Iowa App. 1994). Plaintiffs sufficiently preserved error in this case.

II. Plaintiffs contend the district court abused its discretion by limiting the rebuttal testimony they were allowed to present. They state the conclusions presented in the Rosenbloom article were very important to their case, and they should have been able to present these conclusions through the testimony of Dr. Healy on rebuttal. They point out they were not aware of this testimony when their causation experts testified.

A trial court has a great deal of discretion in determining what is proper rebuttal testimony. *Renze Hybrids, Inc. v. Shell Oil Co.*, 418 N.W.2d 634, 641 (Iowa 1988). On appeal, we review to determine whether the trial court abused this considerable discretion. *Blakely v. Bates*, 394 N.W.2d 320, 324 (Iowa 1986).

The fact that testimony might have been useful and usable in the case in chief does not necessarily preclude its use in rebuttal. *Id.* Rebuttal testimony may not be used merely to strengthen a plaintiff's case in chief. *Moore v. Vanderloo*, 386 N.W.2d 108, 116 (Iowa 1986). Rebuttal evidence is that which explains, repels, controverts, or disproves evidence produced by the opposing party. *State v. Johnson*, 539 N.W.2d 160, 162-163 (Iowa 1995).

In considering the facts of this case, we determine the district court did not abuse its discretion. It appears plaintiffs were aware of the Rosenbloom article during at least a portion of their case in chief. For tactical reasons, they chose not to present

the article at that time, but decided to attempt to present it during rebuttal. We conclude the article was offered on rebuttal to strengthen plaintiffs' case in chief. For this reason, we find no abuse of discretion in the district court's decision not to permit Dr. Healy to testify to the conclusions reached in the article.

III. Plaintiffs also claim the district court abused its discretion in denying their motion for new trial. They claim the court committed an error of law by not allowing rebuttal testimony relating to newly discovered, material evidence. Plaintiffs state that because their causation experts had testified prior to their discovery of the Rosenbloom article, it was logistically impossible to present the article during their case in chief. They claim that since they were unable to present the article in their case in chief, it should be considered newly discovered evidence, which warranted the grant of a new trial.

If a motion for new trial is based on a claim that the trial court erred on a discretionary ground, the trial court's decision is reviewed on appeal for an abuse of discretion. *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993). Here, the district court's decision to limit rebuttal testimony was discretionary. We will not disturb the trial court's ruling unless the evidence clearly shows the court has abused its discretion. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995).

We agree with the district court's conclusion that the Rosenbloom article did not constitute newly discovered evidence which could be presented on rebuttal or which would warrant a new trial. The article was discovered during the course of the

trial, and could have been produced during plaintiffs' case in chief. We find no abuse of discretion in the district court's decision to deny the motion for new trial.

We affirm the district court on all grounds presented in this appeal. Costs of this appeal are assessed to plaintiffs.

AFFIRMED.