IN THE COURT OF APPEALS OF IOWA

No. 0-703 / 09-1717
Filed January 20, 2011

ALMA ROSA MORALES, individually and as next friend for NOHEMI FLORES, JENNIFER FLORES, and ADAL ENRIQUE RUIZ, minors,
Plaintiffs-Appellants,

vs.

DR. LINWOOD L. MILLER, D.O., FAMILY MEDICINE OF MOUNT PLEASANT, P.C., and HENRY COUNTY HEALTH CENTER,
Defendants-Appellees.

Appeal from the Iowa District Court for Henry County, Michael J. Schilling, Judge.

The plaintiffs appeal following a jury verdict for the defendants in a medical malpractice case. **AFFIRMED.**

Gregory T. Racette and Nicholas Platt of Hopkins & Huebner, P.C., Des Moines, for appellants.

Nancy J. Penner, Connie Alt, and Tricia Hoffman-Simanek of Shuttleworth & Ingersoll, P.L.C., and James E. Shipman and Kerry A. Finley of Simmons Perrine Moyer Bergman, P.L.C., Cedar Rapids, for appellees.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

MANSFIELD, P.J.

Following a caesarian section delivery that ultimately led to an emergency hysterectomy, Alma Morales and her children brought a medical malpractice action against her attending physician and the hospital where the procedure was performed. A jury verdict was returned for the defendants, and the plaintiffs now appeal. On appeal, the plaintiffs challenge the district court's allocation of juror strikes, certain rulings on expert designations, and several evidentiary rulings.

We find the district court's allocation of peremptory strikes was permitted by the applicable rule of civil procedure and not an abuse of discretion. Also, in our view, the district court did not abuse its discretion in refusing to allow the plaintiffs to designate an expert witness nearly thirteen months after the deadline to do so, and in declining to rule in advance whether that witness could testify on rebuttal. We also uphold the district court's evidentiary rulings as being either correct, not prejudicial to the plaintiffs, or circumstances where error was not preserved. Thus, we affirm the judgment below.

I. Background Facts and Proceedings.

The trial revealed the following facts: On July 23, 2004, Alma Morales was admitted to Henry County Health Center (HCHC) for a planned caesarean section delivery. Morales had previously delivered two children by C-section and for this pregnancy had received prenatal care from Dr. Kent Metcalf of Family Medicine of Mount Pleasant P.C. Dr. Linwood Miller, also of Family Medicine, performed the C-section and delivered a healthy baby boy at 8:13 a.m. The surgery was completed at 8:41 a.m. and the nursing staff of HCHC provided postoperative care to Morales. At 11:00 a.m., the nursing staff gave Morales her

first dose of Toradol before it had been prescribed by an anesthetist. Late in the day, Morales's condition noticeably deteriorated, and the nursing staff phoned Dr. Miller. At 7:05 p.m., Dr. Miller returned to the hospital and ordered a blood transfusion.

Because of ongoing complications, Morales was transferred to the University of Iowa Hospitals and Clinics (UIHC) at approximately 9:15 p.m. on July 23. Upon her arrival at UIHC, Morales was treated by Dr. Kristin Hermanson, a fourth year resident OB/GYN, and Dr. Asha Rijhsinghani, a staff OB/GYN. By then, Morales had a large amount of blood in her abdomen. Dr. Koenraad DeGeest, a staff OB/GYN surgeon, performed an emergency hysterectomy on Morales. As a result of the surgery, Morales cannot have any more children and states that she suffers from chronic pain in her lower abdominal area.

On March 9, 2006, Morales, on behalf of herself and her three children, filed a medical malpractice suit against Dr. Miller, Family Medicine, and HCHC. She alleged Dr. Miller's uterine incision to enable the delivery on July 23, 2004 had extended into her broad ligament, resulting in profuse bleeding. Dr. Miller, in her view, negligently failed to recognize this and repair the broad ligament while performing the C-section. Morales also alleged Dr. Miller and the nursing staff of HCHC were negligent in their postoperative care on July 23 before her transfer to UIHC at 9:15 that evening. Morales faulted Dr. Miller for not making appropriate rounds and not detecting and repairing the alleged incision of the broad ligament later in the day. She also faulted the HCHC staff for improperly administering Toradol and for not contacting Dr. Miller at various times on July 23.

Morales initially named two family practice physicians as experts and provided their reports on October 2, 2006, just before the Iowa Code section 668.11 deadline of October 11. HCHC identified three experts on January 3, 2007, and Dr. Miller identified six experts on January 9, 2007, including three OB/GYN specialists. (Dr. Miller's designation was technically a few days late under section 668.11, because it was more than ninety days after the plaintiffs' designation, but it was timely under the court's scheduling order, which allowed the defendants ninety days to designate their experts from the plaintiffs' *deadline* for designating experts.) On November 9, 2007, Morales sought to identify an OB/GYN, Dr. C. Paul Sinkhorn, as an additional expert. The court denied Morales's request. Later, Morales repeatedly sought a ruling that she could call Dr. Sinkhorn as a rebuttal witness. The district court declined to rule on this issue until it had an opportunity to hear the defense case.

The case went to trial from October 2 through October 8, 2009. Various witnesses were called. Dr. Hermanson, the OB/GYN resident at UIHC, testified by video deposition, although the district court excluded portions of her testimony on the ground they were opinions formed for purposes of litigation and thus covered by Iowa Code section 668.11. The plaintiffs did not bring Dr. Sinkhorn from California to testify.

The jury found that Dr. Miller and Family Medicine were not negligent, and that HCHC was negligent, but its negligence was not a proximate cause of any damage to Morales.

Morales appeals and claims the district court erred by: (1) granting each of the defendants four juror strikes and not granting the plaintiffs additional juror

strikes; (2) not allowing Dr. Sinkhorn to be designated an expert witness for Morales's case in chief or, alternatively, ruling Dr. Sinkhorn's testimony would be admissible rebuttal testimony; (3) excluding certain deposition testimony of Dr. Hermanson; (4) not permitting Morales to testify to the substance of a phone conservation between her and Dr. Rijhsinghani; and (5) granting the defendants' motions in limine prohibiting Morales's expert, Dr. Cathleen London, from testifying as to the content of a phone conservation she had with Dr. DeGeest.

II. Jury Selection.

Morales first asserts the district court erred by granting the defendants "an excessive amount" of peremptory juror strikes. The district court allowed Morales four strikes, Dr. Miller/Family Medicine four strikes, and HCHC four strikes. Our review is for an abuse of discretion. *See* Iowa R. Civ. P. 1.915(7); *Nichols v. Schweitzer*, 472 N.W.2d 266, 273 (Iowa 1991). An abuse of discretion occurs when the trial court's actions are clearly unreasonable. *Nichols*, 472 N.W.2d at 274.

Iowa Rule of Civil Procedure 1.915 governs the procedure for impaneling a jury. Rule 1.915(7) provides,

> Each side must strike four jurors. Where there are two or more parties represented by different counsel, the court in its discretion may authorize and fix an additional number of jurors to be impaneled and strikes to be exercised. After all challenges are completed, plaintiff and defendant shall alternately exercise their strikes.

Morales asserts Dr. Miller/Family Medicine and HCHC should have shared four strikes, or alternatively, she should have been granted additional juror strikes. There is no question Dr. Miller/Family Medicine and HCHC were

separate parties represented by different counsel, thus bringing this case within the realm of the district court's "discretion" according to the second sentence of rule 1.915(7). *See Nichols*, 472 N.W.2d at 273 (applying rule 1.915(7)'s predecessor). Yet Morales argues the defendants' interests were so closely aligned they had to be considered one defendant for purposes of peremptory strikes, or she had to be given additional strikes. We disagree. The alleged bases for liability as to Dr. Miller and HCHC were different, arising from different sets of alleged acts and omissions. For example, Morales blamed HCHC for not contacting Dr. Miller at several times during July 23, 2004, but she also blamed Dr. Miller for failing to make appropriate rounds. Thus, the district court's allocation of juror strikes was permissible under the rule, and we cannot say the district court abused its discretion.

III. Testimony by Dr. Sinkhorn.

Morales asserts she should have been permitted to designate Dr. Sinkhorn as an expert witness. Failing that, she argues the district court should have allowed Dr. Sinkhorn to testify as a rebuttal witness. Our review is for an abuse of discretion. *Carolan v. Hill*, 553 N.W.2d 882, 889 (Iowa 1996) (rebuttal evidence); *Hantsbarger v. Coffin*, 501 N.W.2d 501, 505 (Iowa 1993) (case in chief). A district court "has broad discretion in ruling on such matters, and the exercise of that discretion will ordinarily not be disturbed unless it was exercised on clearly untenable grounds or to an extent clearly unreasonable." *Hantsbarger*, 501 N.W.2d at 505; *see also Carolan*, 553 N.W.2d at 889.

Early in the case, on June 28, 2006, a civil trial setting conference was held and a memorandum order was issued, which provided the plaintiffs were

required to designate their expert witnesses by October 11, 2006, the defendants were to designate their expert witnesses by January 9, 2007, discovery was to be concluded July 5, 2007, and trial was to begin on September 5, 2007. The plaintiffs designated their experts on October 2, 2006. Thirteen months later on November 9, 2007, after trial had been postponed to June 2008, the plaintiffs requested leave to supplement their expert witnesses to add obstetrician Dr. Paul Sinkhorn. In support of their motion the plaintiffs stated, "Through the course of discovery, Plaintiffs have decided that it would be beneficial to retain an obstetric gynecologist concerning the nature of some of the issues to be addressed in this case." The defendants resisted, asserting the plaintiffs had not demonstrated good cause to supplement their expert witnesses and the defendants would be prejudiced by such a late designation.

On November 28, 2007, the district court issued a ruling denying Morales's request to designate Dr. Sinkhorn. The court's ruling examined the purpose of Iowa Code section 668.11, the particular case history, and the factors weighing for and against a good cause finding under section 668.11. In conclusion, the court stated,

> [T]he deviation from the time limits is serious. Despite the fact that Plaintiffs' case rests on claimed medical malpractice in the delivery of a child, no apparent effort was made by the Plaintiffs to obtain an obstetrical expert witness until nearly one year after the deadline for designation had passed. . . . The plaintiffs have failed to show good cause for their failure to designate experts within the statutory time period. Instead Plaintiffs rely upon the claimed absence of prejudice to the Defendants. This claim is based upon the fact that this case will not be tried until June 24, 2008. On the face of it, the fact that the trial is not immediately at hand operated to the Plaintiffs' advantage. However the Defendants point out that late designations are, in fact, prejudicial. They can provide the Plaintiffs with an opportunity to change the shape and nature of the case and

> require additional investigation, discovery, and expense prior to trial.
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> . . . .
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> The Court concludes that the Plaintiffs' delay in requesting an extension of the expert witness deadline constitutes a serious deviation from the requirements found in section 668.11. Defense counsel did not contribute to the Plaintiffs' delay and to permit the late disclosure, although not immediately prior to trial, would prejudice the Defendants to an appreciable degree. By the time the matter is brought to trial, this case will have been pending for over two years. To allow the Plaintiffs to now change the potential nature of the defense will result in more expense to the defense. The Plaintiffs had adequate opportunity both initially and at the July 2007 civil trial setting conference to make such a request. . . .

Morales moved the district court for reconsideration and also asked the supreme court to accept an interlocutory appeal. Both requests were denied.

On April 21, 2008, the plaintiffs designated Dr. Sinkhorn as a rebuttal expert witness and shortly thereafter provided his report. Both defendants thereupon moved to strike the plaintiffs' rebuttal witness designation. The district court denied the defendants' motions, but in effect did so without prejudice.

At the commencement of trial, which ultimately did not occur until October 2009, Morales asked the court to rule specifically whether Dr. Sinkhorn's testimony *would or would not* be allowed as rebuttal evidence. The district court denied the request, stating it would not "rule on this in the abstract" and "the way to do this would be to let the defense present their case and then we make a determination of whether it's proper rebuttal." In the midst of trial, when Morales again made the same request, the district court adhered to this position:

> Dr. Sinkhorn's credentials as an OB-GYN specialist do not, standing alone, make his testimony rebuttal testimony. The key element in rebuttal testimony analysis is not the training or background of a particular witness, but rather the witness's testimony and whether that testimony will be directed at new matters first introduced by the opposing party. Under such

> analysis, it really doesn't make any difference—direct difference whether Dr. Sinkhorn is an OB-GYN doctor or a family practitioner. What matters is exactly what the rebuttal testimony will be and whether it is directed at new matters first introduced by the opposing party.
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> The issue concerning blood flow from the abdominal cavity to the vaginal cavity is not at this point in the trial [a] new matter . . .
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> . . . In this Court's judgment, it would be improper for the Court to at this point, on this record, to issue a strict prohibition against any effort by the Plaintiff to introduce rebuttal testimony . . .
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> . . . It's virtually impossible for the Court to issue a final ruling on this issue and be fair to the Plaintiff because I haven't heard the testimony of all the defense witnesses at this point. Therefore, the Court's ruling today should be considered only as a temporary ruling, subject to hearing all the evidence from the defense witnesses, because once that entire record is before the Court, then the Court can truly gauge whether the testimony offered by Dr. Sinkhorn, in whole or in part, would be directed to new matters first introduced by the opposing party.

Morales's counsel candidly explained to the court that his concern was having to pay for Dr. Sinkhorn to come from California without knowing he would be able to testify. Based on the foregoing rulings, Morales ultimately did not attempt to offer Dr. Sinkhorn as a rebuttal witness.

A. Direct Testimony.

Morales asserts she should have been permitted to designate Dr. Sinkhorn as an expert witness for her case in chief. Iowa Code section 668.11 provides,

> 1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:
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> a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time of disclosure.
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> b. The defendant within ninety days of plaintiff's certification.
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> 2. If a party fails to disclose an expert pursuant to subsection 1 or does not make the expert available for discovery, the expert

> shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown.
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> 3. This section does not apply to court appointed experts or to rebuttal experts called with the approval of the court.

See also Hantsbarger, 501 N.W.2d at 505 (holding that substantial compliance with section 668.11 is required). There is no dispute Morales failed to designate Dr. Sinkhorn as an expert within the section 668.11 timeframe. Rather, Morales maintains she offered good cause for an untimely designation. Thus, we must determine whether the district court properly exercised its discretion in refusing to allow the designation and recognize the existence of "good cause." *See* Iowa Code § 668.11(2); *Hantsbarger*, 501 N.W.2d at 505-06 (indicating that the district court could consider the seriousness of the deviation, prejudice to the defendant, and the actions of defense counsel).

Here Morales sought to add an expert witness in November 2007, thirteen months after her section 668.11 deadline. Although Morales claims she only discovered the need for an OB/GYN expert witness after fact discovery took place in September 2007, the negligence allegations in the case always revolved around obstetrical issues, namely whether Dr. Miller negligently performed a C-section procedure and whether he and the hospital provided inadequate postnatal care. Dr. Miller himself designated several obstetricians as experts back in January 2007. It is difficult to see why the plaintiffs did not recognize the need for an obstetrician expert until November 2007.

Morales further complains the defendants only provided lists of names in January 2007, whereas she provided actual expert reports in October 2006. But

section 668.11 does not require a report, only a designation. Whatever the merit of Morales's position, it is an argument best addressed to the legislature.

We agree the prejudice from allowing Dr. Sinkhorn to serve as an expert would not have been overwhelming, because the case was not scheduled to be tried until June 2008 and, due to the historic floods that occurred, the trial date was actually postponed to October 2009. But there would have been some prejudice—at a minimum, additional work required of defense counsel and defense experts. In its ruling, the district court carefully evaluated the conduct of the parties, the purpose of section 668.11, the extent of noncompliance, and the prejudice to the defendants. *Cf. Hantsbarger*, 501 N.W.2d at 505 (explaining that good cause existed where the plaintiff had provided the names of the expert witnesses to the defendants prior to the deadline and a complete designation was only delinquent for about one week). We find no abuse of discretion.

B. Rebuttal Testimony.

Morales next argues the district court should have ruled (in advance) that Dr. Sinkhorn would be permitted to testify as a rebuttal expert witness. As noted above, the district court decided it could not determine whether Dr. Sinkhorn's testimony would be appropriate rebuttal until the defense had presented its witnesses. *See Carolan*, 553 N.W.2d at 889 ("Rebuttal evidence is that which explains, repels, controverts, or disproves evidence produced by the opposing party. Evidence that has no direct tendency to do this is inadmissible on rebuttal."). Upon reviewing the trial transcript, and the numerous attorney-court colloquies on this subject, we have no disagreement with the district court's thorough and well-reasoned handling of this issue. *See Kilker v. Mulry*, 437

N.W.2d 1, 6 (Iowa Ct. App. 1988) (explaining that the trial court did not make a ruling on the admissibility of rebuttal testimony because it stated it would make that determination at the close of the defense testimony).

Therefore, Morales waived her argument that rebuttal expert testimony from Dr. Sinkhorn should have been permitted by not attempting to introduce such testimony after the defense rested. We recognize the plaintiffs were reluctant to incur the expense of transporting Dr. Sinkhorn from California without knowing if he would be permitted to testify. But even then, plaintiffs made no effort to pursue less expensive alternatives, such as a telephonic deposition. We find the issue was not preserved.

IV. Redaction of Dr. Hermanson's Deposition Testimony.

Morales also asserts the district court erred in not permitting her to introduce at trial the entire video deposition of Dr. Hermanson. Dr. Hermanson is an OB/GYN physician and, on July 23, 2004, she was in her fourth year of residency at UIHC. She treated Morales upon her transfer to UIHC, assisted Dr. DeGeest when he performed the hysterectomy on Morales, and provided care to Morales following the surgery until July 2006. A video deposition of Dr. Hermanson was taken on May 22, 2008, but she was not designated as an expert witness pursuant to Iowa Code section 668.11. The district court sustained defendants' objections to certain portions of the deposition as constituting expert testimony without a required section 668.11 designation. In determining whether the district court properly exercised its discretion in excluding Dr. Hermanson's deposition testimony, our review is for an abuse of

discretion. *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 479-80 (Iowa 2004).

The following testimony was redacted:

> Q. The question was, I asked you to assume that she had the surgery that morning at 8:00 . . . Completed it at 9:00, was in recovery until 10:00, and then at 6:20 or so the nurses called the doctor . . . because of excessive bleeding. With that scenario, do you think that this injury you saw to her broad ligaments occurred at the time of surgery? . . . . A. Okay. . . . I personally think that this most likely happened at the time of surgery. I think she had a—a venous bleed, and it was slow. And in a young woman, you can lose a lot of blood volume before it starts to affect your blood pressure. So I think it was probably something that was slowly going on. And then at 6:00 or, you know, around 6:00 o'clock that night, I think it got to be so intense that she started to become coagulopathic, meaning going into DIC, which caused heavier bleeding and more of the arterial bleeding also.
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> . . . .
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> Q. Okay. Doctor, have—have you seen this—have you ever had that happen where you uterine incision does go into the broad ligament, extends into the broad ligament? A. Yes.
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> Q. Okay. And what do you normally see when that occurs? A. You can see bleeding into this broad ligaments, and you can see the vessels bleeding, and so—so then you—the hope is that you take care of it at the time of surgery. So you just fix the bleeding at the time of surgery.
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> . . . .
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> Q. Doctor, do you have an opinion based on reasonable medical certainty and probability as to whether or not the extension you saw of the uterine incision in the broad ligament was the cause of the hysterectomy she had to undergo? . . . . A. Yes . . . .

The court also redacted an exchange where Dr. Hermanson was asked whether she had treated Morales for the same pain for which she later saw another physician. (That other physician's notes were read to Dr. Hermanson in the course of questioning.) Dr. Hermanson answered that she could not completely answer the question but it appeared to be the same pain. Additionally, the court redacted a question and answer where Dr. Hermanson was asked whether

Morales's pain could be eliminated or not, and Dr. Hermanson said she could not comment on Morales long-term outlook for pain.

The parties disagree whether the redacted testimony involved opinions reached by Dr. Hermanson as a treater or in the course of the litigation. *Hansen*, 686 N.W.2d at 480 (distinguishing the two circumstances in clarifying when a treating physician must be designated as an expert pursuant to section 668.11). Morales does not dispute that Dr. Hermanson was provided some records before her video deposition to which she did not have access when she actually treated Morales.

The redacted questions fell into two basic categories—questions about the allegation that an incision of the broad ligament occurred during the C-section procedure and questions about Morales's long-term pain issues. We agree the first set of questions present a close case under *Hansen.* Arguably, although the form of the questions seemed to invite defendants' objections, Dr. Hermanson was just being asked to restate opinions she could have formed while treating Morales. On the night of July 23, 2004, Dr. Hermanson's immediate concern had to do with Morales's bleeding; still, she could have been considering the *cause* of that bleeding. But in any event, Morales cannot prevail on this argument because she cannot demonstrate prejudice. *See* Iowa R. Evid. 5.103 (error may not be predicated on the exclusion of evidence unless a substantial right of a party is affected); *see, e.g.*, *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999) (explaining that on appeal we will not reverse a district court's evidentiary ruling unless it constitutes an abuse of discretion and prejudice has resulted); *In re Marriage of Ihle*, 577 N.W.2d 64, 69 (Iowa Ct. App. 1998) ("We will not presume

the existence of prejudice when evidence is excluded from trial."). In other portions of the deposition that were played to the jury, Dr. Hermanson testified that she believed the injury to the broad ligament occurred at the time of the C-section surgery. For example, she testified,

> Q. Okay. And where do you—what—where did this extension into the broad ligament, where did that come from in your opinion? A. I think it happened at the—if I understand your question correctly, I think it happened at the time of surgery. It's—when you make the incision and you deliver the baby's head, it's—sometimes that incision extends into the broad ligament. And so it gets into these vessels in the broad ligament, and the main vessels that you can get into are the uterine artery and vein. So I think that the bleeding was coming from the uterine artery and vein, the majority of the bleeding.

Thus, we believe the jury heard the substance of Dr. Hermanson's views on this subject.

The issue is not as close with regard to the questions and answers about pain. To answer those questions, Dr. Hermanson had to be briefed on what happened after she stopped treating Morales, and even then her answers were somewhat speculative by her own admission. Morales cannot demonstrate that these opinions were reached by Dr. Hermanson while she was treating Morales, or that the exclusion of Dr. Hermanson's inconclusive answers prejudiced her.

V. Morales's Testimony Regarding a Phone Conversation with Dr. Rijhsinghani.

Morales next asserts the district court erred in not permitting her to testify to the content of a phone conservation between herself and Dr. Asha Rijhsinghani. Our review is for an abuse of discretion. *See Coralan*, 533 N.W.2d 889 (rebuttal testimony); *Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 885 (Iowa 1994) (evidentiary rulings).

Before trial, Dr. Miller/Family Medicine filed a motion in limine. Paragraph seven sought to exclude "[a]ny testimony regarding alleged hearsay statements" by Morales's treating healthcare providers, and further specified that it sought to exclude repetition of medical statements made to laypersons (Morales and her family members). HCHC also filed a motion in limine that sought to exclude testimony by plaintiffs or any other witnesses regarding alleged statements by Morales's treating health care providers. Morales responded that she did "not intend to introduce lay witness testimony referencing statements made by [Morales's] treating physicians" and that this portion of the motions in limine was moot. Consequently, the district court granted the defendants' motions.

During trial, Dr. Miller testified about a phone conservation he had with Dr. Rijhsinghani:

> Q. All right. And did you get any indication from Dr. Rijhsinhgani that there was any finding at the time of surgery that was of concern with regard to your surgery? A. I don't recall that she said anything about that.

Morales's counsel did not object to this testimony, but later during cross-examination of Dr. Miller, he informed the court he believed the above testimony was a violation of the ruling on the motions in limine. He sought to introduce Morales's testimony regarding the contents of a phone conversation between Dr. Rijhsinghani and her. As Morales recalled, Dr. Rijhsinghani had told her there had been a cut in her uterus.

The district court noted Morales had not timely objected to Dr. Miller's testimony, ruled Morales's testimony would not be proper rebuttal, and offered to instruct the jury to disregard Dr. Miller's testimony. The district court then read

back the above-quoted testimony to the jurors (as requested by Morales's counsel) and instructed them not to consider it as evidence.

On appeal, Morales contends she should have been permitted to testify to the alleged phone conservation between herself and Dr. Rijhsinghani regarding the C-section once Dr. Miller had been allowed to testify to what Dr. Rijhsinghani allegedly told him. Instead of allowing plaintiffs to match hearsay with hearsay, the district court did the converse and struck Dr. Miller's testimony. We find no abuse of discretion here.

That is especially true because the excluded hearsay does not appear to have been all that helpful to Morales. According to her counsel, Morales planned to testify Dr. Rijhsinghani had told her there was a "cut in her uterus" and "[t]hat may be incorrect as far as the anatomy, but it's important to hear." But of course, every C-section involves a cut to the uterus. The jury would have had to draw the further inference that Dr. Rijhsinghani actually told Morales there had been an incision to the broad ligament.

VI. Dr. London's Testimony Regarding a Phone Conversation with Dr. DeGeest.

Morales finally argues the district court erred in prohibiting her expert Dr. London from testifying to the contents of a phone conservation she had with Dr. DeGeest in 2005. Our review is for an abuse of discretion. *Brunner v. Brown*, 480 N.W.2d 33, 37 (Iowa 1992) ("The trial court had considerable discretion in the admission of expert testimony."). "To establish an abuse of that discretion, it must be shown that it was exercised on untenable grounds or was clearly erroneous." *Id*.

Before trial, the defendants filed motions in limine, asking the district court to rule that Morales's expert Dr. London could not testify to the phone conservation with Dr. DeGeest. Morales responded that Dr. London's opinions were based in part on this phone conversation and that Iowa Rule of Evidence 5.703 permitted Dr. London to relay hearsay evidence she considered in forming her opinion. The defendants asserted that (1) reliance is reasonable only when based upon medical records and sworn testimony, not a phone call, and (2) Dr. DeGeest had twice testified and the jury should hear directly from Dr. DeGeest. In its ruling, the district court said it had to determine whether the underlying evidence was reasonably relied upon for purposes of rule 5.703. *See Brunner*, 480 N.W.2d at 480. The court stated, "At this time, the Court does not have the benefit of any of the alleged conservation between Dr. DeGeest and Dr. London." The court further held,

> The issue is better determined after a full hearing on the specific evidence relied upon. Based upon the limited record, the Court SUSTAINS the Motion as to paragraph 5 until a more detailed record can be made on the issue.

Morales apparently did not provide the court with Dr. London's deposition transcript where she had testified about this conversation.[1] Later, during trial, Dr. London testified as a live witness, and Morales failed to make an offer of proof.

[1] During oral arguments in our court, Morales's counsel maintained the district court *had* been provided with a transcript of Dr. London's deposition testimony at the time it ruled on the motion in limine. We are unable to confirm this representation from our review of the record. In any event, the district court did not indicate in its ruling that it had seen the deposition transcript, and its ruling was clearly a provisional one, placing the burden on plaintiffs to raise the issue again when Dr. London took the stand.

On appeal, the defendants contend Morales has not preserved this issue for our review because she did not make an offer of proof when Dr. London took the stand. Generally, a ruling on a motion in limine is not a final ruling that preserves an issue for appeal:

> Ordinarily, error claimed in a court's ruling on a motion in limine is waived unless a timely objection is made when the evidence is offered at trial. However, "where a motion in limine is resolved in such a way it is beyond question whether or not the challenged evidence will be admitted during trial, there is no reason to voice objection at such time during trial. In such a situation, the decision on the motion has the effect of a ruling."
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> The key to our analysis is to determine what the trial court ruling purported to do. "A ruling only granting or denying protection from prejudicial references to challenged evidence cannot preserve the inadmissibility issue for appellate review." However, "if the ruling reaches the ultimate issue and declares the evidence admissible or inadmissible, it is ordinarily a final ruling and need not be questioned again during trial."

State v. Alberts, 722 N.W.2d 402, 406 (Iowa 2006) (citations omitted). Morales states this ruling falls within the foregoing exception because it was "unequivocal." We disagree. The district court expressly stated it was only sustaining the motions *until* a more detailed record could be made. It "did not resolve the matter is such a way that it was beyond question that the challenged evidence would not be admitted during trial." *Id.* Consequently, we agree with the defendants that this issue was not preserved for our review.

VII. Conclusion.

For the foregoing reasons, we affirm the judgment below.

AFFIRMED.