

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-0251

Cir. Ct. No. 98-CV-1834

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**MICHAEL W. STOCKTON, JEAN M. STOCKTON
AND MICHAEL J. HAACK, A MINOR, BY HIS GUARDIAN
AD LITEM, DANIEL W. STEVENS,**

**PLAINTIFFS-APPELLANTS-
CROSS-RESPONDENTS,**

v.

**WILLIAM C. HASELOW, M.D., AND WISCONSIN
PATIENTS' COMPENSATION FUND,**

**DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS,**

ABC INSURANCE COMPANY,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court
for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Michael Haack, by his guardian ad litem, and Michael and Jean Stockton (collectively, Stockton) appeal from a judgment dismissing their medical malpractice and related claims against Dr. William Haselow and the Wisconsin Patients' Compensation Fund (Dr. Haselow). On appeal, Stockton argues that the circuit court erroneously restricted the scope of his rebuttal examination of a witness and erroneously submitted a question to the jury which the court should have answered as a matter of law. We reject these arguments and affirm. Because we affirm the dismissal of Stockton's claims, we need not decide Haselow's cross-appeal challenging the jury's damages award.

¶2 In January 1995, five-year-old Michael Haack fell onto a bag of garbage and was speared in the buttocks by broken glass in the bag. Michael and his mother were assisted at their home by a neighbor, Scott Schowalter, an emergency medical technician (EMT). Schowalter and Michael's mother drove Michael to the hospital emergency room where he was treated by Dr. Haselow. Dr. Haselow examined Michael and stitched up his wound without taking an x-ray of the area.

¶3 In July 1997, Michael noticed an increasingly large lump on his thigh. During an operation, a large piece of glass was removed. Further x-rays showed four more pieces of glass in Michael's body. Michael had a second surgery in September 1997 for another large piece of glass, but the surgeons were unable to remove it for fear of profuse bleeding. Michael had two more surgeries in April and August 1998 to address problems related to the presence of glass in his body. Michael still has glass in his body. Stockton brought a medical malpractice action against Dr. Haselow.

¶4 At trial, Dr. Haselow testified that he recalled Schowalter telling him that the piece of glass in Michael's buttocks had been removed by the family, and that the glass had not broken. Dr. Haselow relied upon this information because Schowalter is trained as an EMT to take a patient's history. Therefore, Dr. Haselow did not x-ray Michael before closing the wound. Dr. Haselow testified that had he been told the glass had not been removed or if Schowalter had not been a reliable source of information, he would have ordered an x-ray to determine if any glass remained in Michael's body.

¶5 In light of Dr. Haselow's testimony, Stockton sought to present Schowalter's testimony in rebuttal. The circuit court restricted Stockton to asking five questions of Schowalter: (1) whether Schowalter accompanied Michael to the hospital; (2) whether Schowalter told Dr. Haselow he felt a grating sensation (pieces of glass rubbing against each other) when he inspected the wound; (3) whether Schowalter told Dr. Haselow the glass did not break; (4) whether Schowalter told Dr. Haselow the glass had been removed; and (5) whether Schowalter told Dr. Haselow he did not believe that any glass remained in Michael's wound.

¶6 In rebuttal, Schowalter testified that he accompanied Michael to the emergency room but denied all of the statements attributed to him by Dr. Haselow. On cross-examination, Schowalter testified that he had minimal recollection of the incident, did not recognize Dr. Haselow, did not know whether Dr. Haselow was in the treatment room when he was there, and Stockton was not in the treatment room the entire time Michael was being treated.

¶7 In surrebuttal, Dr. Haselow testified that he recognized Schowalter from the emergency room visit and that he stood by his previous testimony about

what Schowalter told him during the emergency room visit. Stockton then returned Schowalter to the witness stand to have him confirm that he is a trained EMT. On cross-examination, Schowalter testified that as an EMT, he is trained to deal with glass wounds and to inspect wounds with protruding objects.

¶8 The jury found that Dr. Haselow was not negligent in his care and treatment of Michael, and that Dr. Haselow was not required to offer alternative diagnostic studies (such as an x-ray) to Michael's parents.

¶9 Stockton argues on appeal that the circuit court misused its discretion in restricting his questioning of Schowalter on rebuttal. Stockton argues that Schowalter should have been permitted to testify on rebuttal to all the details of his involvement in the matter: from the time he arrived at Michael's house (where he observed the wound and searched for the glass which might have caused it) to his opinion that glass likely remained in Michael. Stockton also argues that Mrs. Schowalter should have been permitted to testify in rebuttal regarding her observations at Michael's house after he was injured. Neither Schowalter nor his wife testified during Stockton's case-in-chief.

¶10 Dr. Haselow counters that Schowalter could not offer true rebuttal testimony because Stockton learned during discovery of Dr. Haselow's reliance on Schowalter's statement. Therefore, Dr. Haselow's defense at trial was not a new issue for which rebuttal evidence could be offered. The Fund argues in its separate respondent's brief that Stockton violated the scheduling order by not listing Schowalter as a witness and therefore could not present him in rebuttal.

¶11 The scope of rebuttal testimony is within the circuit court's discretion, and that discretion must be exercised "reasonably on the basis of the circumstances and the facts of record." *Pophal v. Siverhus*, 168 Wis. 2d 533,

554-55, 484 N.W.2d 555 (Ct. App. 1992). Rebuttal evidence is appropriate “when the defense injects a new matter or new facts.” *Id.* at 555.

¶12 In addressing the scope of Schowalter’s rebuttal testimony, the circuit court found that Schowalter was being called specifically to rebut Dr. Haselow’s testimony that Schowalter made statements to him about Michael’s wound. The court’s analysis of the purpose of rebuttal evidence is correct under the law. The defense alleged that Schowalter made statements to Dr. Haselow; the court permitted Stockton to call Schowalter in rebuttal to state whether he made the statements attributed to him by Dr. Haselow.

¶13 We also disagree with Stockton that rebuttal evidence can be used to buttress the credibility and weight of the plaintiff’s case without considering the purpose of rebuttal evidence. Here, the circuit court appropriately limited Schowalter’s testimony to that testimony which would rebut the contentions of Dr. Haselow.

¶14 We reject Dr. Haselow’s argument that Schowalter could not be a rebuttal witness and should have testified in Stockton’s case-in-chief. While Stockton could have called Schowalter as a witness, Stockton was not required to do so in order to present Schowalter’s rebuttal testimony on the question of whether he made statements to Dr. Haselow about Michael’s wound. The question is not whether a party knew of a witness, but whether that witness’s testimony became relevant during the course of the trial. *See id.* Even though Schowalter did not testify in the case-in-chief, his testimony became relevant when Dr. Haselow testified that Schowalter made statements to him about Michael’s injury.

¶15 We further disagree with Dr. Haselow that the scheduling order somehow controls who can be a rebuttal witness. Rebuttal evidence is determined based solely on what comes out at trial, which cannot be anticipated with absolute certainty in advance.

¶16 Stockton complains that the five questions did not give the jury a foundation for Schowalter's testimony. Schowalter was being asked to testify as to whether he made certain statements to Dr. Haselow; he was not testifying as a medical witness regarding the appropriateness of Dr. Haselow's treatment decisions. Had Stockton wanted to present the Schowalters' impressions of the wound and related events, Stockton should have presented these witnesses in the case-in-chief.¹

¶17 Stockton next argues that the circuit court erred in submitting to the jury Dr. Haselow's proposed special verdict question: "Was Dr. Haselow required to offer alternate diagnostic studies to the parent of Michael Haack?" Stockton argues that the proper inquiry was whether Dr. Haselow had a duty to inform Michael's parent of all alternative modes of treatment and specifically whether Dr. Haselow had a duty to offer an x-ray. This duty, Stockton argues, presented a question of law for the circuit court, not the jury, to decide.

¶18 We agree with Dr. Haselow that this argument is waived because Stockton did not object to the special verdict question. "Failure to object at the

¹ In his deposition, Dr. Haselow contended that Schowalter told him certain things about Michael's injury and that he relied on those statements in determining the course of Michael's treatment, including whether to order an x-ray. Therefore, Stockton was on notice of Dr. Haselow's likely trial testimony and whether the Schowalters' testimony would be relevant to their case.

conference constitutes a waiver of any error in the proposed ... verdict.” WIS. STAT. § 805.13(3) (1999-2000). If counsel fails to object to the form of the special verdict, the circuit court does not have an opportunity to correct the error. *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). “[I]n the absence of a specific objection which brings into focus the nature of the alleged error, a party has not preserved its objections for review.” *Id.* at 10 (citation omitted). Submitting a proposed special verdict of one’s own is not sufficient to constitute an objection to the circuit court’s selection of another party’s proposed special verdict.

¶19 Because we affirm on the appeal, we need not address the cross-appeal challenging the damages awarded by the jury.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

