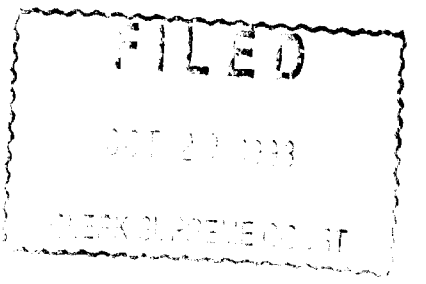
IN THE COURT OF APPEALS OF IOWA

No. 8-329 / 97-0722
Filed October 29, 1998

ROBERT L. BELLMAN, Administrator of the Estate of DEREK R. BELLMAN, Deceased,
Appellee,
vs.

CITY OF CEDAR FALLS, IOWA,
Appellant,
vs.

CEDAR FALLS SCHOOL DISTRICT and SARTORI MEMORIAL HOSPITAL,
Third-Party Defendants.



Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert, Senior Judge.

The City of Cedar Falls appeals from a jury's determination of damages in a bifurcated trial arising from the wrongful death of a minor child. **AFFIRMED.**

James E. Walsh, Jr., Christy R. Liss and Bradley A. Temple of Clark, Butler, Walsh & Hamann, Waterloo, for appellant.

Gene Yagla and Karla J. Shea of Yagla, McCoy & Riley, P.L.C., Waterloo, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

HUITINK, J.

The City of Cedar Falls (City) appeals from a jury's determination of damages arising from the wrongful death of a minor child. We affirm.

I. Background Facts and Proceedings.

Derek Bellman, a kindergarten student, was killed while his class was participating in a safety program conducted in part by the Cedar Falls Police Department. A golf cart had been used during the safety demonstrations and a Cedar Falls police officer had left the key in the cart. While the students were being allowed to tour an ambulance, some students began playing on the golf cart, eventually setting it in motion. Derek was struck by the cart, pinning his head between the cart and a door on the ambulance. He died a few hours later.

Derek's father filed suit against the City on behalf of his son's estate. Although the petition named as plaintiff only Robert Bellman, as administrator of Derek's estate, the body of the petition contained a claim for loss of consortium by Derek's parents. The City filed cross-petitions against Cedar Falls School District and Sartori Memorial Hospital, whose ambulance had been involved in the injuries. The Bellmans never filed suit against either the school district or the hospital.

Trial was scheduled to begin on January 7, 1997. Prior to trial, the City admitted fault in causing Derek's death. In an order filed December 27, 1996, the district court ruled only the issue of damages would be tried on January 7, and the issue of apportioning fault among the three defendants would be tried at a later date.

In a subsequent order, the court again noted the city admitted its fault and the sole issue to be tried was damages.

Prior to trial, the City filed a motion in limine seeking to exclude any evidence of damages related to the parents' loss of consortium because the suit had not been brought on behalf of them individually. The district court overruled the motion, noting the consortium claim had been pled in the body of the petition. The court indicated the parents could move to amend the petition to reflect their individual claims. At trial, the parents orally moved to amend the petition to include their claims. Over the City's objection, the court granted the amendment. It also denied the City's request for a continuance because it found the defendant had knowledge of the claim since the petition was filed and, it was, therefore, no surprise.

At trial, the Bellmans accepted the $150,000 valuation the City's expert had placed on the loss of accumulation to the estate. Rather than introduce evidence from their own expert, the Bellmans read into evidence the interrogatory answer of the City's expert. The City did not object to this procedure.

The trial was scheduled for three days. Prior to trial, the Bellmans twice notified the court and the City they intended to rest their case on the afternoon of the first day of trial. The Bellmans indeed rested during the afternoon of the first day. Halfway through the second day, when it only had two witnesses left, the City informed the court it needed a continuance because its expert witness was not available to testify. In lieu of a continuance, the City offered to have the expert testify

via telephone or by supplementing his interrogatory answer. The court denied the requests.

The jury returned a verdict awarding $909,260.51 in damages. It specifically awarded $150,000 in loss of accumulation to Derek's estate and $750,000 in past and future loss of consortium to the parents. Following a hearing on post-trial motions, judgment was entered against the City in accordance with the jury verdict.

The City requested a nunc pro tunc order withdrawing the entry of judgment. The City claimed the trial court erred in ordering the clerk to enter judgment on the verdict since the trial had been bifurcated and only the issue of damages had been decided. It claimed entry of a judgment should have been withheld until the liability trial was concluded. The district court declined to enter the nunc pro tunc order.

On appeal, the City argues the district court erred in: (1) allowing the Bellmans to amend their petition to include claims by the parents individually and also denying the City's motion for a continuance after the parents were allowed to amend; (2) not allowing its expert to testify and in refusing to allow his interrogatory answer to be supplemented; (3) failing to grant a directed verdict, judgment notwithstanding the verdict, or a new trial on the issues of loss of accumulation to the estate and past and future loss of consortium; (4) refusing to instruct the jury that grief and suffering are not recoverable as a measure of damages for loss of companionship; and (5) entering judgment on the damages verdict when the liability portion of the

trial had not yet been held. We find each argument to be without merit and, accordingly, affirm.

II. Amendment of Petition and Denial of Continuance.

A district court's ruling on a motion to amend the pleadings is reviewed for an abuse of discretion. *Britt-Tech Corp. v. American Magnetics Corp.*, 487 N.W.2d 671, 674 (Iowa 1992). An amendment which substantially changes the issues should not be allowed. *Doerring v. Kramer*, 556 N.W.2d 816, 819 (Iowa App. 1996). Generally, amendments are the rule and denials the exception. *In re Marriage of Fields*, 508 N.W.2d 730, 732 (Iowa 1993). A denial of a motion for continuance is also reviewed for an abuse of discretion. *Netteland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 167 (Iowa Ct. App. 1993). A ruling on a motion for continuance rests in the sound discretion of the trial court. *Countryman v. McMains*, 381 N.W.2d 638, 640 (Iowa 1986). A district court's ruling on such matters is presumptively correct, and a party challenging the ruling has a heavy burden to overcome the presumption. *Rattenborg v. Montgomery Elevator Co.*, 438 N.W.2d 602, 605 (Iowa App. 1989).

The City claims it was error to allow the Bellmans to amend their petition to name Derek Bellman's parents individually. It maintains the oral motion to amend on the day of trial injected new and distinct causes of action, thus substantially altering the issues involved. The City contends it was further error to deny its motion for a continuance based upon the Bellmans' "last-minute" amendment. The City asserts it did not prepare to defend against a loss of consortium claim due to the action

originally being plead by the estate only. It argues it would have deposed the parents prior to trial had the action been pleaded properly. We find both positions to be without merit.

The City should have been aware a loss of consortium claim was being asserted in this case. Not only was the issue clearly set out in a separate paragraph of the petition, but the City prepared a motion in limine on the issue which it presented two weeks before trial. The loss of consortium claim was also discussed at the pretrial conference. The fact the City chose to ignore the possibility of litigating the consortium issue does not support the contention that the amendment substantially altered the issues at trial.

The question is could the City have prepared for the events it now claims justify its position. *See Countryman*, 381 N.W.2d at 640. Our review of the record clearly indicates the City could have prepared for the defense of a loss of consortium claim. We find no error in the district court's grant of leave to amend or in its denial of the City's motion for continuance.

III. Expert Testimony.

District courts have the inherent power to enforce our discovery rules and may impose sanctions for a party's failure to obey. (Cite). Exclusion of expert testimony is within the realm of sanction alternatives. *Hubby v. State*, 331 N.W.2d 690, 697 (Iowa 1983). We will reverse the imposition of a sanction only when trial court abused its discretion. *Hoekstra v. Farm Bureau Mut. Ins. Co.*, 382 N.W.2d 100, 108

(Iowa 1986). We find an abuse of discretion when such discretion is exercised on grounds or for such reasons clearly untenable or to an extent clearly unreasonable. *Id.* Thus, an abuse of discretion is rarely found. *Wheeler v. Dental East, P.C.*, 494 N.W.2d 248, 250 (Iowa App. 1992).

The discovery and designation of expert witnesses is controlled by Iowa Rule of Civil Procedure 125. The rule, in pertinent part, states:

> A party may through interrogatories require any other party to state the name and address of each person whom the other party expects to call as an expert witness at trial and to state, with reasonable particularity:
>
> (A) The subject matter on which the expert is expected to testify;
>
> (B) The designated person's qualifications to testify as an expert on such subject; and
>
> (C) The mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to, or form the basis of, the mental impressions and opinions held by the expert.

Rule 125 also imposes a duty to supplement answers to interrogatories propounded to expert witnesses. The rule provides:

> **Duty to Supplement Discovery as to Experts.** If a party expects to call an expert witness when the identity or the substance of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, or when the substance of an expert's testimony has been updated, revised or changed since the response, such response must be supplemented to include the information described in subdivisions (a)(1) (A)-(C) of this rule, as soon as practicable, *but in no event less than thirty days prior to the beginning of trial except on leave of court.* If the identity of an expert witness and the information described in subdivisions (a)(1) (A)-(C) are not disclosed or supplemented in compliance with this rule,

> the court in its discretion may exclude or limit the testimony of such expert, or make such orders in regard to the nondisclosure as are just. (emphasis added).

The trial of this matter was scheduled to begin January 7, 1997. Both parties timely designated their experts. The Bellmans' expert timely responded to interrogatories propounded by the City, and also timely supplemented his responses.

The City's expert, Dr. William Conway, responded to the interrogatories propounded by the Bellmans, including the interrogatory which was read into evidence. Dr. Conway's interrogatory responses were very short, conclusory opinions. Specifically, the interrogatory read into evidence concluded the estate of Derek Bellman had been diminished by $150,000 or less. His answer contained no factual basis for his opinion. Dr. Conway did not produce a full report detailing his factual basis and mental impressions until December 31, 1996. Counsel for the Bellmans did not receive Dr. Conway's report until January 2, 1997, five days before trial. It is this report which the City offered into evidence in lieu of Dr. Conway's testimony.

The City contends the district court abused its discretion in excluding Dr. Conway's testimony and in not allowing his interrogatory response to be supplemented. It claims the spirit and purpose of Rule 125 was fulfilled, and the sanction was too harsh. We disagree.

The purpose of Rule 125 is "to avoid surprise to litigants and to permit issues to become both refined and defined before trial." *Mercy Hospital v. Hansen, Lind &*

Meyer, P.C., 456 N.W.2d 666, 670 (Iowa 1990). In this case, the surprise to the Bellmans is well-documented. Had they known Dr. Conway would vary his opinion, they very likely would have elected to depose him, and would certainly have put on their own expert to testify on the amount of loss to the estate. We find the spirit and purpose of Rule 125 was served by the district court in its exclusion of Dr. Conway's testimony. We find the district court acted well within its discretion.

IV. Motion for Directed Verdict and Post-Trial Motions.

Denial by the trial court of a motion for directed verdict is reviewed for correction of errors of law. *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 858 (Iowa 1994). A judgment notwithstanding the verdict must stand or fall on the grounds stated in the motion for directed verdict. *Faught v. Budlong*, 540 N.W.2d 33, 35 (Iowa 1995). We review a denial of a motion for judgment notwithstanding the verdict under the same standards as a denial of a directed verdict. *Id.*

The evidence is viewed in the light most favorable to the nonmovant and it is determined whether sufficient evidence existed to warrant submission of the issues to a jury. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684 (Iowa 1990). To grant a directed verdict, a trial court must find the evidence, when considered in the light most favorable to the opposing party, is insufficient as a matter of law to sustain the allegations brought. *Nash v. Schultz*, 417 N.W.2d 241, 243 (Iowa App. 1987). The trial court is vested with considerable discretion in determining whether

evidence is sufficient to submit the issue to the jury. *Oberreuter v. Orion Industries, Inc.*, 398 N.W.2d 206, 209 (Iowa App. 1986).

We also consider whether reasonable minds could differ on the issues in controversy. *Spaur*, 510 N.W.2d at 858. If they could, the issue should be submitted to the jury. *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975). To successfully resist a motion for directed verdict the plaintiffs must show merely there is evidence sufficient to submit the question to the jury; they do not need to prove their claims. *Miller v. Young*, 168 N.W.2d 45, 51 (Iowa 1969).

Denial of a motion for a new trial is reviewed for an abuse of discretion. *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996). If a jury verdict is not supported by sufficient evidence and the verdict fails to effectuate substantial justice, a new trial may be ordered. *Thompson v. Rozeboom*, 272 N.W.2d 444, 446 (Iowa 1978).

The City's argument on all three of these issues is that the evidence supporting both the loss of accumulation to the estate and the loss of consortium claims is insufficient to reach a conclusion. We disagree.

Turning first to the loss of accumulation to the estate of Derek Bellman, the only evidence offered to prove the amount of damages was the conclusory statement made by Dr. Conway in his interrogatory answer. He stated, as a result of Derek's death, the estate had been diminished "by $150,000 or less." The Bellmans accepted

his answer to the interrogatory and read it into evidence in lieu of presenting their own expert witness. The City made no objection to this procedure.

It is important to note Dr. Conway was the City's expert. His interrogatory answer served as a judicial admission by the City on the issue of loss of accumulation of the estate. *See Hofer v. Bituminous Cas. Corp.* 260 Iowa 81, 83, 148 N.W.2d 485, 486 (Iowa 1967)("A judicial admission is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for purposes of litigation that the proposition of fact alleged by the opponent is true"). The admission by Dr. Conway of the projected loss to the estate of $150,000 or less dispensed with the need for other evidence to prove the element of damages to the estate. The evidence on the loss of accumulation to the estate no doubt could have been stronger, but we cannot find the evidence is insufficient as a matter of law.

On the issue of the parents' loss of consortium claim, the City's argument is the evidence is insufficient because the only two witnesses were Derek's parents. The City asserts the evidence is insufficient because no outside witnesses testified to the extent of Derek's relationship with his parents. We find this argument to be without merit. The evidence presented is clear as to the day-to-day activities Derek would engage in with his mother, father, and older sister. The testimony was, as the City points out, very emotional. The evidence nevertheless detailed the services and society Derek provided to his parents.

We hold the district court properly denied the City's motion for directed verdict and motion for judgment notwithstanding the verdict. We also hold the court did not abuse its discretion in denying the City's motion for a new trial or remittitur.

V. Jury Instruction.

We will find reversible error when the instructions given to the jury, viewed as a whole, fail to convey the applicable law. *Benn v. Thomas*, 512 N.W.2d 537, 539 (Iowa 1994). We will not grant a reversal on the basis of error in giving or refusing to give a particular jury instruction unless the action results in prejudice to the defendant. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 892 (Iowa 1996). We will not reverse for marginal or technical omissions, but the instructions must thoroughly and fairly convey the law applicable to the issues presented. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994).

The City contends the jury instruction given on the loss of consortium claim did not correctly state the applicable law. The instruction given to the jury required the jury to exclude "mental anguish of the parents caused by the death of the child" in calculating damages for the loss of consortium claim. The City asserts it was error for the court not to instruct the jury that grief, suffering, and mental anguish are not recoverable. We disagree. We hold the instruction given to the jury did convey the applicable law and the district court did not err by refusing to include the terms "grief" and "suffering."

VI. Judgment Entry.

The City, citing an agreement with Bellman's attorney, contends judgment should have been withheld pending resolution of disputed allocations of fault between the city, the school district, and Sartori Hospital. This issue was raised in the City's motion for a nunc pro tunc order setting aside the judgment entered after trial. An affidavit filed by the City's attorney stated:

> It was my understanding that there would be no judgment entered against any particular defendant until that particular defendant's percentage of fault was determined. Plaintiff's attorney Yagla indicated that the primary reason for his clients wishing to proceed with the damages portion only was to alleviate their mental anguish and that the timing of collection of any monies was not important to them. He also indicated that the (and his clients) understood there would be no proceedings to collect on any verdict until after the percentages of fault had been determined at the second trial.
>
> I do not understand how any particular judgment against a particular defendant could be entered, without a prior determination of that particular defendant's percentage of fault.

The City's motion was summarily denied.

In its January 3, 1997, pretrial order, the district court stated:

> The parties advised the court that the City of Cedar Falls was admitting fault and liable to the plaintiff but was reserving the right to dispute the allocation of fault between the defendants. In essence, the parties advised the court that the sole issues litigated at trial on January 7th would be damages and defendants would later litigate the allocation of fault.

While this language substantially confirms counsel's version of a bifurcated proceeding, we do not believe it precludes entry of a judgment against the city. We

have not considered whether counsel agreed to withhold execution on any resulting judgment and do not intimate how that issue should be resolved.

AFFIRMED.