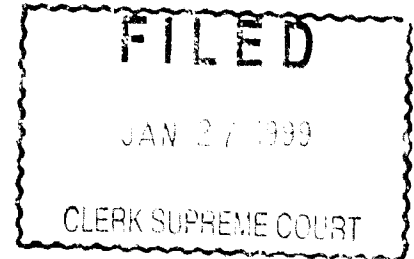


IN THE COURT OF APPEALS OF IOWA

No. 8-631 / 97-2038
Filed January 27, 1999

LYLE D. CATES and DEBBIE L. CATES,
Individually and as Parents and Next Friends
of **KASEY L. CATES,**
Appellants,



vs.

BRADLEY JOE HOFLAND,
Appellee.

Appeal from the Iowa District Court for Sioux County, James D. Scott, Judge.

Plaintiffs appeal from a district court judgment entered in favor of the defendant in plaintiffs' action for damages for personal injuries suffered by their son when his bicycle was hit by the defendant's vehicle. **REVERSED AND REMANDED.**

Robert B. Deck, Sioux City, for appellants.

Daniel B. Shuck of Heidman, Redmond, Fredregill, Patterson, Plaza & Dykstra, L.L.P., Sioux City, for appellee.

Heard by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

STREIT, J.

Plaintiffs appeal the trial court's denial of their motion to continue the trial date of their personal injury lawsuit and the trial court's jury instructions. Because we find substantial justice would have been more nearly obtained by granting the continuance, and plaintiffs needed and deserved a continuance, we reverse and remand for a new trial. The plaintiff has not preserved his objections to the jury instructions for appeal.

I. Background Facts and Proceedings.

On August 24, 1994, Bradley Joe Hofland's pickup truck struck a bicycle driven by a minor child, Kasey Cates. Cates, through his parents Lyle and Debbie Cates, filed a personal injury action against Hofland two days later. Hofland filed a timely answer alleging comparative fault.

A trial date of August 5, 1997, was established at a trial setting conference. In July 1997, plaintiffs filed a motion to continue the trial date. The plaintiffs sought to continue the trial based on the following facts: (1) Kasey and Debbie now lived in New Mexico; (2) Debbie had just been hired at a new job which would be placed in jeopardy if she returned to Iowa on the scheduled trial date; (3) travel to Iowa would be prohibitively expensive by air and her car could not endure the trip at this time; and (4) the plaintiffs' primary medical expert would not be available for trial and could not provide a deposition prior to trial. Following a hearing, the district court denied the motion.

The matter proceeded to trial as scheduled. Plaintiffs did not attend and their testimony was presented through use of their depositions. The jury returned a verdict in defendant's favor, ruling he was not at fault. The plaintiffs appeal, challenging the district court's denial of their motion for continuance and the trial court's jury instructions.

II. Motion for Continuance.

The decision to grant or deny a continuance of trial rests within the discretion of the trial court. *Hawkeye Bank & Trust v. Baugh*, 463 N.W.2d 22, 26 (Iowa 1990). We will reverse only when that discretion is abused. *Id.*

The trial court is given guidelines to help exercise its discretion when presented with a motion for continuance, which we in turn use to measure the reasonableness of the trial court's decision. *Id.* These guidelines provide "a continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained." Iowa R. Civ. P. 183(a). Thus, when a motion for continuance is promptly filed, "alleging a cause not stemming from the movant's own fault or negligence, the court must determine whether substantial justice will be more nearly obtained by granting the request." *State v. Birkestrand*, 239 N.W.2d 353, 360 (Iowa 1976).

Injustice may appear when, for less than "weighty reasons," a court denies a continuance and thereby prevents a party from being present at trial. *Hawkeye Bank*

and Trust, Nat. Ass'n v. Baugh, 463 N.W.2d 22, 26 (Iowa 1990). “Many trial continuances are sought on legitimate grounds. In spite of careful plans and diligent preparations, an unanticipated event will on occasion necessarily precipitate a continuance motion.” *State v. LaGrange*, 541 N.W.2d 562, 564 (Iowa App. 1995). Trial judges are called upon to do justice to those needing and deserving a continuance, while at the same time resolutely moving the trial assignment toward the speedy resolution of cases. *Id.* “The trial judge must sense whether a given continuance motion stems from a legitimate need, or from a wish to delay.” *Id.*

We are aware a trial court has “very broad” discretion in ruling on a motion for continuance. *Id.* Given the broad discretion vested in the trial court to grant or deny continuances, we are reluctant to reverse the trial court’s decision. *See Ragan v. Petersen*, 569 N.W.2d 390, 393 (Iowa App. 1997). This is especially so given the trial court’s mission to move its case toward a just and fair resolution. However, we find the facts of this case warrant reversal. Several factors influence our decision. First, there is no evidence plaintiffs sought a continuance for the purpose of delaying the trial, and the events which occasioned the need for a continuance could not have been foreseen before the continuance was sought. The second significant factor influencing our decision is that the plaintiff is a minor and has no other way to assert his rights other than through his guardian. Kasey has no control over the location of his residence or his parents’ financial circumstances.

Under these circumstances, we think substantial justice would have been more nearly obtained by granting a continuance and that the plaintiffs needed and deserved a continuance. The trial court abused its discretion in not granting the continuance.

III. Jury Instructions.

The plaintiff argues the trial court erred in formulating instruction numbers 19 and 22 patterned after uniform jury instructions 600.11 and 700.71. Although the plaintiff's contentions may have merit if presented to the district court, "we do not consider on appeal objections to jury instructions which were not presented to the trial court." *See Kansas City Life Ins. Co. v. Hullinger*, 459 N.W.2d 889, 897 (Iowa App. 1990).

REVERSED AND REMANDED.

Sackett, C.J., and Huitink and Vogel, JJ., concur; Mahan, J., dissents.

MAHAN, J. (dissenting)

I respectfully dissent. I believe the trial court was well within its discretion in denying the motion for continuance. I would, therefore, affirm the trial court.