

IN THE COURT OF APPEALS OF IOWA

DENNIS J. FRATZKE, as)
Administrator of the Estate)
of Daniel Joseph Fratzke,)
DENNIS J. FRATZKE and)
SANDRA A. FRATZKE,)

Plaintiffs-Appellants,)

vs.)

TERESA J. MEYER,)

Defendant-Appellee.)

8-297
87-1436

FILED

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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Benton County
(No CL1649-9-84), Harold J. Swailes, Judge.

Plaintiffs appeal an adverse judgment in a wrongful
death action. **AFFIRMED.**

Morris L. Eckhart, of Milroy & Eckhart, Vinton, for the
plaintiffs-appellants.

David L. Riley, of Lindeman & Yagla, Waterloo, for the
defendant-appellee.

Considered by Oxberger, C.J., and Donielson and
Schlegel, JJ.

OXBERGER, C.J.

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Plaintiffs appeal an adverse judgment in a wrongful death action. They contend the district court erred by denying their motion for a change of venue. They also challenge two evidentiary rulings and a ruling on jury instructions. Our review is for the correction of errors at law. We affirm.

Eleven-year-old Daniel Fratzke was killed when struck by a car while riding his bicycle on a highway. His parents brought the present wrongful death action against the driver of the car. The first trial of this wrongful death action was in 1985 and resulted in a judgment for the defendant. We reversed and remanded the case for a new trial for failure to instruct the jury regarding the degree of care to be observed by a motorist who observes or should observe a child riding a bicycle along a public road. Fratzke v. Meyer, 398 N.W.2d 200 (Iowa App. 1986). In the second trial, a jury once again returned a verdict for the defendant. The plaintiffs have appealed from the resulting judgment.

The plaintiffs contend the district court erred in four respects: (1) in denying plaintiffs' motion for change of venue; (2) in refusing to allow plaintiffs' expert to testify about his calculations regarding the speed and acceleration of the boy's bicycle; (3) by admitting testimony that the boy's father had filed for bankruptcy

before the boy's death; and (4) by refusing to give their requested instruction about the irrelevance of insurance coverage.

I.

Plaintiffs contend the district court erred by denying their motion for a change of venue. They assert that they were prejudiced by news stories which disclosed that the jury in the first trial had found no negligence, that no criminal charges had been filed against the defendant, and that the boy had pulled out in front of the defendant. Plaintiffs argue that these stories had the effect of prejudging the merits of the case. Plaintiffs also argue that the impact of the stories was magnified by the small population of the county. There were five articles, two of the articles appeared more than three years before trial. Another appeared two years before trial. Two others appeared ten months before trial.

Our review of a case involving claimed error in refusing to grant a change of venue on the basis of pretrial publicity is for an abuse of discretion. Locksley v. Anesthesiologists of Cedar Rapids, 333 N.W.2d 451,454 (Iowa 1983). Venue challenges based on media publicity generally arise in criminal cases. While criminal cases are reviewed under a more stringent standard with respect to this question, the discussion of the impact of publicity in criminal cases is instructive. Id. Exposure to news

accounts does not establish ipso facto a substantial⁹⁷ likelihood of prejudice in the minds of prospective jurors. State v. Johnson, 318 N.W.2d 417, 422 (Iowa 1982). The mere fact that a juror has been exposed to information concerning the case does not justify the conclusion that the juror is prejudiced. State v. Cornelius, 293 N.W.2d 267, 269 (Iowa 1980). In State v. Gavin, the court said:

For the purpose of determining juror prejudice, the relevant question is not what a juror has been exposed to, but whether the juror holds such a fixed opinion of the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant.

360 N.W.2d 817, 819 (Iowa 1985).

The record in this case supports the trial court's finding that the news accounts do not appear to be inaccurate, misleading or unfair. There is no indication of any attempt to inflame the public or sensationalize the case. We find this mere exposure to information concerning the case insufficient to amount to prejudice to warrant a change of venue. We support the trial judge's assertion that this matter is one which can be remedied by proper voir dire and appropriate instruction on the subject of publicity. Accordingly, we find no abuse of discretion on this issue.

II.

Plaintiffs also contend the district court erred by refusing to allow their expert to testify about his

calculations regarding the speed and acceleration of the boy's bicycle. The district court excluded this testimony on the ground that it exceeded the previously disclosed scope of the expert's testimony and would unfairly surprise the defendant. The plaintiffs contend this ruling was erroneous because the testimony was otherwise admissible and because the nature of the witness's engineering expertise made the testimony predictable.

The trial court has the inherent power to enforce discovery rules. Exclusion of expert testimony is within the realm of sanction alternatives. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 108 (Iowa 1986) (citing Hubby v. State, 331 N.W.2d 690, 697 (Iowa 1983)). On review of the imposition of such a sanction, we will reverse only when the trial court has abused its discretion. "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. Sullivan v. Chicago & Northwestern Transp., 326 N.W.2d 320, 324 (Iowa 1982).

Dr. Carstens was identified as an expert witness in a supplemental interrogatory answer filed by the plaintiffs. Defendant proceeded to depose Dr. Carstens in advance of trial. Dr. Carstens' deposition did not reveal any testimony or results of experiments which related to the

speed and acceleration of the boy's bicycle. Dr. Carstens also indicated in his deposition that he had no idea what Danny Fratzke's speed on his bicycle might have been and that he had not been asked to make such a computation.

Iowa Rule of Civil Procedure 125(a)(2) requires a party to supplement his or her response to previous discovery in relation to the identities of expert witnesses, the expected subject matter of their testimony, and the substance of their testimony. Plaintiffs failed to supplement the substance of Dr. Carstens' testimony as it was revealed in deposition. Accordingly, we find no abuse of discretion in the trial court's limitation of the expert's testimony to that which was previously revealed in deposition.

III.

Plaintiffs contend the district court erred by admitting testimony that the boy's father had filed for bankruptcy before the boy's death. The plaintiffs argue that this testimony was irrelevant and was prejudicial because of the social stigma attached to bankruptcy. The defendant contends that the evidence of the father's bankruptcy was relevant to damages. As we find for the defendant on appeal, we need not reach this issue which relates to damages. Shannon v. Gaar, 234 Iowa 1360, 1366, 15 N.W.2d 257, 260 (1944) (where the jury finds for defendant exclusion of evidence as to damages is immaterial).

IV.

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Plaintiffs contend the district court erred by refusing to give their requested instruction about the irrelevance of insurance coverage. We agree that it is good practice for the court to give such an instruction. Price v. King, 255 Iowa 314, 321, 122 N.W.2d 318, 323 (1963); Laguna v. Prouty, 300 N.W.2d 98, 101-02 (Iowa 1981); Fratzke v. Meyer, 398 N.W.2d 200, 205-06 (Iowa App. 1986). We agree with the defendant's argument that since the jury found for the defendant on the liability issue, there is no danger that the jurors were influenced by the fact that the defendant did have insurance. Conversely, if the jurors assumed the defendant did not have insurance, they assumed nothing more than they are supposed to assume. See Lagura v. Prouty, 300 N.W.2d 98, 101 (Iowa 1981). We find the plaintiffs were not prejudiced by the failure of the district court to give such an instruction. Therefore, we find any error in the omission of this instruction to be harmless.

AFFIRMED.