IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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ROBIN L. STRAIN, As Guardian and Next of Kin of **ADAM STRAIN**, A Minor,

Plaintiff-Appellant,

vs.

WAYNE HEINSSEN, M.D.,

Defendant-Appellee.

8-202
87-748

Appeal from the Iowa District Court for Pottawattamie County (No. 55174), J. C. Irvin, Judge.

Plaintiff appeals from a jury verdict in favor of defendant doctor in a medical malpractice case. **REVERSED AND REMANDED.**

Edward H. Jelinek, Daniel B. Cullan, and Gene Cullan of Cullan Law Firm, Des Moines, for plaintiff-appellant.

Thomas J. Shomaker of Sodoro, Daly & Sodoro, Omaha, Nebraska, and Richard D. Crotty, Council Bluffs, for defendant-appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

DONIELSON, P.J.

Plaintiff, Adam Strain, a minor child through his mother, Robin Strain, as guardian and next of kin, filed a petition at law against Wayne Heinssen, M.D., alleging that defendant was negligent with respect to the care rendered to Robin Strain during the labor and delivery of Adam Strain and that such negligence was a contributing cause of permanent brain damage and associated injuries. A jury returned a verdict for the defendant, and the plaintiff has appealed from the resulting judgment. We reverse and remand for new trial.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

The plaintiff contends the district court erred by refusing to let her cross-examine two of the defendant's medical experts about their alleged bias or prejudice. The plaintiff asserts these two doctors were paid by the defendant's malpractice insurance carrier and had been retained by that insurance carrier for similar testimony on previous occasions. The district court refused to allow cross-examination on this subject because such cross-examination would bring to the jury's attention that the defendant carried malpractice liability insurance.

Iowa Rule of Evidence 411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion

> of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

It is clear in Iowa that the existence of liability insurance is not admissible to show one's negligence or other wrongful conduct. However, rule 411 does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of bias or prejudice of a witness.

In Charter v. Chleborad, 551 F.2d 246, 248-49 (8th Cir. 1977), a medical malpractice case, the court held that the fact a defense witness was employed, in part, by the defendant's insurer was admissible to show bias of the witness and that the probative value of this evidence far outweighed any danger of unfair prejudice. In addition, the court concluded that the trial court's exclusionary ruling was not harmless in light of the importance of expert testimony. Id. at 249.

The evidence before us is that Dr. Farb and Dr. Elston (witnesses) were employed by St. Paul Fire & Marine Insurance Company (St. Paul), defendant's insurance carrier, and had done work for St. Paul on prior occasions. The trial court was not required to preclude that part of their cross-examination which would reveal the relationship between them and St. Paul. Their testimony in this respect may be relevant to the question of bias or prejudice.

As it relates to relevancy, we believe that the attorney who intends to offer evidence as to the existence of insurance should notify the trial court beforehand so that an in camera determination can be made as to the good faith of the offer. The trial court did this.

We find that plaintiff should have been permitted to cross-examine the witnesses as to their employment and subsequently inquire whether St. Paul insured the defendant. We do not interpret rule 411 in such a manner as to permit examination beyond that. From that point on, the offered testimony may or may not be subject to a relevancy objection. If a relevancy objection is made, it will then be for the trial court to rule. In addition, if testimony is received under rule 411, the jury should be properly instructed as to its purpose so as to minimize the prejudicial effect that the existence of insurance may have as to the negligence or other wrongful conduct claim.

Because rule 411 specifically sets forth the exceptions for which evidence of insurance coverage may be admissible, we do not find application of rule 411 to this case to be restrictive or limiting. Rule 411 clearly was formed to neutralize witness bias or prejudice. Requiring notice and an in camera hearing provides fairness to both sides because it insures that any testimony regarding insurance coverage is not being offered merely to prove negligence or wrongful conduct. We do not believe a witness may be

called to testify for an insurance company who is a real party in interest and give the impression to the jury that he or she is a disinterested witness without the other party being able to bring to the jury's attention the fact the witness has been employed by the insurance company numerous other times. This situation is exactly why rule 411 was created.

Therefore, we hold exclusion of the challenged evidence from the jury was reversible error. See Charter v. Chleborad, 551 F.2d at 249. We do not find defendant was prejudiced. With the vast amount of recent publicity surrounding medical malpractice insurance costs, the jurors in this case undoubtedly were cognizant of the fact the defendant doctor was insured against loss for malpractice. As our supreme court said in Price v. King, 255 Iowa 314, 321, 122 N.W.2d 318, 322 (1963):

> Plaintiff expresses fear of resulting prejudice if the jury knows or suspects that an insurance company is interested in the result of the trial. This is an expression of a theory or suspicion long recognized in our law but which is no longer tenable. It assumes that jurors are so naive as to not think of insurance unless brought to their attention and that if insurance is suspected or known verdicts will be based on sympathy without regard for the factual issues submitted. Undoubtedly there are verdicts based on the idea that the defendant will not have to pay but this is most apt to happen when the jurors are left to speculate and are not properly advised and instructed.
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> Insurance coverage with multiple provisions and features has become so common and extensive that the uninsured litigant in automobile damage cases is the exception rather than the rule. [citation omitted] It is not too much to assume that jurors

> and even judges know what everyone else knows, i.e., that some insurance company may have some interest in some phase of the lawsuit.

We reverse the ruling of the district court and remand this case for new trial.

Plaintiff also contends the district court erred by refusing to grant a mistrial on the ground of alleged misconduct by the defendant's attorney. After a review of the record, we do not find the district court abused its discretion in overruling plaintiff's motion for mistrial on this ground.

REVERSED AND REMANDED.